No. _____

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER, by CAREY MILLER; RICK MILLER; and JAMES MILLER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an individual deprived of due process of law when a District Court and Court of Appeals deny him the opportunity under Federal Rule of Civil Procedure 60(b)(4) to contest as void for want of jurisdiction as to him the original ruling of the District Court and the decision of the Court of Appeals in an earlier appeal that he is the *alter ego* of certain corporations, where, although the corporations appeared in the District Court and then unsuccessfully appealed its finding of their supposed *alter-ego* status, the individual himself never appeared, appealed, or otherwise participated in the action until he filed his Rule 60(b)(4) motion long after the first appeal?

II. Is an individual deprived of due process of law when a District Court and Court of Appeals refuse to set aside under Federal Rule of Civil Procedure 60(b)(4) a default judgment the District Court entered against him under Federal Rule of Civil Procedure 55, notwithstanding that the Court of Appeals in an earlier appeal had held that the individual had in fact appeared in the original action in the District Court through his supposed *alter-ego* corporations? Or, in the alternative, is Federal Rule of Civil Procedure 55 repugnant as applied to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because it allowed the District Court to enter, and the Court of Appeals to affirm, a default judgment against the individual under those circumstances?

III. Is an individual deprived of due process of law when a District Court and Court of Appeals deny him the opportunity under Federal Rule of Civil Procedure

QUESTIONS PRESENTED FOR REVIEW – Continued

60(b)(4) to show that he had not been properly served with process by publication pursuant to Arkansas Rule of Civil Procedure 4(f), on the grounds that corporations supposedly his *alter egos* had appealed that issue earlier in the case and the Court of Appeals had decided it against them, and notwithstanding that the individual himself had neither appeared nor participated in either that appeal or the District Court proceedings leading up to it?

IV. Is Arkansas Rule of Civil Procedure 4(f) repugnant as applied to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, because it licenses service of process by publication on an individual even though the parties purporting to serve him thereby made no significant attempt to effect service by other, more effective means first?

V. May an individual's personal property, seized from him but not sold in the course of execution on a civil judgment, be retained by the judgment-creditor without any judicial scrutiny of the creditor's right to possession?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, the judgment of which is here for review, include:

1. petitioner Tony Alamo ("Alamo"), appellant in the Court of Appeals; and

2. respondents Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; and James Miller ("the Millers"), appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Part III of the Rules of this Court, Tony Alamo petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion the Court of Appeals issued in support of its judgment ("*Miller II*") is unreported, and appears in the Appendix hereto ("Pet. App.") at 1a. The orders of the United States District Court for the Western District of Arkansas of 12 February and 24 April 1992, which *Miller*

II affirmed, are unreported, and appear in Pet. App. at 3a and 9a, respectively. The earlier opinion of the Court of Appeals (*"Miller I"*) is reported at 924 F.2d 143 (8th Cir. 1991), and appears in Pet. App. at 11a.

JURISDICTION

The Court of Appeals entered its judgment and opinion in *Miller II* on 19 November 1992. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

This case involves application of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States to Federal Rules of Civil Procedure ("FRCP") 55 and 60(b)(4), and to Arkansas Rule of Civil Procedure ("ARCP") 4(f), pertinent parts of which appear in Pet. App. at 23a.

STATEMENT OF THE CASE

I. Overview. The facts of this case frame five fundamentally important issues of due process:

- Notwithstanding *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*[1], may Alamo be held to be the *alter ego* of two corporations when they, *but not he*, appeared in the District Court and then unsuccessfully appealed the District Court's finding of *alter-ego* status?
- Notwithstanding *Hovey* v. *Elliott*[2], may Alamo have a *default* judgment entered against him when the District Court found that the corporations that did appear were his *alter egos*,

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[1] 395 U.S. 100 (1969).

[2] 167 U.S. 409 (1897).

and when on the corporations' appeal the Circuit Court not only affirmed that finding but also ruled that Alamo had in fact appeared in the District Court through them?

- Notwithstanding *Zenith Radio*, on an appeal by the supposedly *alter-ego* corporations may Alamo be held to have been properly served by publication, when he personally participated in neither the District Court proceedings that led to the finding of *alter-ego* status nor the appeal?
- May Alamo be served by publication when the Millers made no significant effort to attempt to serve him by more effective means first? And,
- May Alamo's personal property, seized but not sold in the course of execution of the judgment the Millers obtained, be retained by them without any judicial scrutiny of their right to possession?

II. The original proceedings in the District Court. On 12 October 1988 the Millers filed a complaint in the District Court against the Tony and Susan Alamo Foundation ("the Foundation"), the Music Square Church, and five individuals including Alamo.[3] On 16 November 1988 the Corporations answered, for themselves and purportedly on behalf of Alamo, denying liability and asking that the complaint "be denied, dismissed, and held for naught".[4] Disregarding this answer as an appearance by Alamo, on 14 February 1989 the Millers moved for a continuance, alleging that

- the Foundation "filed an Answer";

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[3] Alamo will refer to the entities collectively as "the Corporations".

[4] Appellant Tony Alamo's Appendix (Eighth Circuit Rule 30A(B)(3)) in *Miller* v. *Alamo*, No. 92-1447 WAFS (8th Cir.), at 31. This document will be cited hereinafter as "Alamo's Cir. Ct. App.".

- "[s]ervice copies of the Complaint on all other defendants were subsequently returned to [the Millers'] counsel and marked 'Return to Sender, Not at This Address' ";
- the Millers "have been unable to perfect service of process against * * * Alamo";
- the Millers "have served interrogatories upon [the Corporations] in an attempt to locate [Alamo]"; and
- "[u]pon receipt of the answers to [their] Interrogatories, [the Millers] shall secure the services of a private detective agency to locate and serve [Alamo]".[5]

The Millers made only this one attempt to serve Alamo at "P.O Box 398, Alma, Arkansas" between 12 October 1988 and 14 February 1989. On 16 February 1989 United States District Judge Morris S. Arnold allowed the Millers until 12 May 1989 to serve Alamo.[6] Later, however, in another case Judge Arnold testified that

- "good cause" for an extension of time under FRCP 4(j) must be established "through testimony or sworn affidavit";

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[5] *Id.* at 35. The Millers filed this motion because FRCP 4(j) would otherwise have required dismissal of the action as to Alamo. Although the motion was silent as to the date of attempted service on Alamo, on 21 June 1989 one of the Millers' attorneys stated in an affidavit that

> [o]n or about October 24, 1988, service of process was attempted on all named defendants * * * at the following last known address: P.O. Box 398, Alma, Arkansas, 72921. Service copies of all of the Complaints, except that directed to the Foundation, were returned * * * marked "Return to Sender, Not at This Address."

Alamo's Cir. Ct. App. at 68.

[6] Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket No. 5, *in* Alamo's Cir. Ct. App. at 4.

- the Millers attached "[n]o affidavit" and "nothing under penalty of perjury" to their motion;
- the motion did not allege that Alamo was evading service;
- the motion "doesn't say" what the Millers did to perfect service other than the one mailing to Alma, Arkansas; and
- the Millers' statement that "they have been unable to perfect service of process" was just a bald assertion.[7]

Dissatisfied with the Corporations' answers to interrogatories, on 2 May 1989 the Millers moved for and were granted an additional 60 days to serve Alamo.[8]

Overlapping these events, on 27 March 1989 the District Court allowed the Foundation to "strik[e] the incorrect reference to Tony Alamo individually in [its] previously filed Answer".[9] The Corporations then answered separately, denying all liability. This clarified that the Corporations' counsel did not represent Alamo.[10]

On 21 June 1989 B.E. Holmes, one of the Millers' attorneys, filed an affidavit in support of service under ARCP 4(f), stating that

- sometime after 23 May 1989, the Millers' counsel "received a copy of a pamphlet distributed by the Holy Alamo Christian Church and Seminary which mentioned the instant suit in a message from * * * Alamo" and listed "[t]he address of the * * * Church * * * as 13136 Sierra Highway, Canyon Country, California 91350";

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[7] Alamo's Cir. Ct. App. at 140-145.

[8] *Id.* at 60, 64. The Foundation had answered that Alamo was living in "some hotel in Los Angeles", California. *Id.* at 54. This corroborated other information the Millers already had. *See post*, note 13 & accompanying text.

[9] Alamo's Cir. Ct. App. at 59.

[10] As *Miller I* recognized, 924 F.2d at 147: "Appellants' [*i.e.*, the Corporations'] attorney does not represent Alamo."

- on 6 June 1989 the Millers mailed the complaint, summons, and returns of service to Alamo at that address – but "[t]he Complaint was returned to [Holmes] on June 19, 1989, marked 'Return to Sender. Not presently at this address' ";
- "[d]espite diligent inquiry, [Holmes] has been unable to date to obtain information concerning the whereabouts of the individual defendants" – but Holmes described no "diligent inquiry" other than receipt of the pamphlet and mailing to the "Sierra Highway" address; and
- "the defendants are evading service of process" – but Holmes described no "evas[ion]", explicitly conceding instead that, "[d]espite indications that Mr. Alamo is operating out of the Holy Alamo Church in California, a return of 'not presently at this address' has been made. Use of the word 'presently' implies that Mr. Alamo has recently been there or will be returning there, and that his whereabouts are known to one or more individuals at the Holy Alamo Church".[11]

In fact, the Millers knew much earlier that the Holy Alamo Church was located in Saugus, California,[12] because (among other things) the allegedly tortious conduct that underlay their complaint took place there in January of 1988.[13]

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[11] Alamo's Cir. Ct. App. at 70-71.

[12] In the mid-1980s, Canyon Country changed its name to Saugus.

[13] *See* Complaint ¶ 31. *See also, e.g.*, Transcript of the Trial of 27-28 November 1989, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), Vol. 1, at 25; Vol. 2, at 97-98, 114-15; Vol. 3, at 13. For a key example, Carey Miller described how, in January of 1988, he had hired a private detective who located his son at the church property. Transcript, Vol. 2, at 97-98.

On 9 August 1989 Holmes filed an affidavit of service, stating that

> • "[a] Warning Order [under ARCP 4(f)] was published in [a local Arkansas newspaper] on June 29, 1989 and July 6, 1989"; and
>
> • "[a]lso, in accordance with [ARCP 4(f)], the Warning Order, together with a copy of the Complaint and Summons * * * , were served upon each of the individual defendants at their last known address by U.S. Mail restricted delivery, on June 26, 1989. Attempts for service were made for each of these packages on June 28, 1989 and July 7, 1989, but the envelopes were 'unclaimed,' and were ultimately returned to [Holmes] on July 14, 1989".[14]

Holmes attached a letter of 6 June 1989 from her to the Postmaster of the Alma Arkansas Branch, seeking "any more recent addresses [than P.O. Box 398, Alma, Arkansas 72921]" for four individual defendants, *but not including Alamo*. The Postmaster replied that "[w]e are unable to provide up-dated addresses for these individuals".[15] Holmes attached nothing that sought a "more recent address" *for Alamo* from the Postmaster either in Alma *or in Saugus*. Holmes also attached a copy of the envelope and postal return-receipt addressed (but not delivered) to Alamo at "P.O. Box 398, Alma, Arkansas 72921", and marked "Unclaimed" and "postage due $2.00".[16] But the Millers sent nothing to Alamo at the Saugus address, respecting which Holmes had earlier stated that "[u]se of the word 'presently' implies that Mr. Alamo has recently been there or will be returning there".

On 9 August 1989 the Millers sought entry of, and on 17 August 1989 the Court Clerk entered, default against Alamo for "hav[ing] failed to plead or otherwise

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[14] Alamo's Cir. Ct. App. at 91.

[15] *Id.* at 101-02.

[16] *Id.* at 108.

defend".[17] On 27 and 28 November 1989 the District Court held a default hearing on the issue of damages against Alamo. Neither the Corporations nor Alamo participated.[18]

On 5 and 6 March 1990 the District Court held a hearing on whether the Corporations were Alamo's *alter egos*. Alamo did not participate.[19] On 19 April 1990 the court found the Corporations to be Alamo's *alter egos*, set aside their corporate forms, dismissed them as parties to the case, and ruled that any judgment thereafter entered against Alamo would also lie against them.[20] And on 27 April 1990 the court entered a huge money judgment (later amended) against Alamo,[21] which resulted in the seizure of real and personal property. The court did not consider whether, having held the Corporations to be Alamo's *alter egos*, and the Corporations having denied all liability in the answers they filed prior to 9 August 1989, the entries of a *default* and a *default* judgment against Alamo were improper.[22]

III. The first appeal. The Corporations appealed, raising two issues relevant here: namely, that the District Court (i) lacked *in personam* jurisdiction over Alamo, and

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[17] *Id.* at 110, 111.

[18] *See* Transcript of the Trial of 27-28 November 1989, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), cover sheet (showing appearance by the Millers' counsel only); Transcript of the Trial of 6-7 March 1990, No. 88-2206 (W.D. Ark.), Vol. 1, at 44-45 (showing the Corporations not parties to the default hearing).

[19] *See* Transcript of the Trial of 6-7 March 1990, *Miller* v. *Tony and Susan Alamo Fd'n*, No. 88-2206 (W.D. Ark.), Vol. 1, at 3.

[20] *See* Miller I, 924 F.2d at 145-46.

[21] *See* Miller v. Tony and Susan Alamo Fd'n, 748 F. Supp. 695 (W.D. Ark. 1990).

[22] FRCP 55(a) permits entry of default only "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend".

(ii) erred in finding the Corporations his *alter egos*. Alamo did not appeal. "No action [was] taken regarding the default, and no appeal [was] perfected therefrom"; "[n]o appeal [was] perfected from th[e personal] judgment [against Alamo]"; and the Corporations' "attorney d[id] not represent Alamo".[23]

The Circuit Court decided the appeal on 23 January 1991. As to personal jurisdiction, the court "noted in passing" that

> service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with [ARCP] 4(f). The rule reads:
>
> > Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order * * * .
> >
> > The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. * * * The warning order was * * * duly published.[24]

The court adverted to no supposed "facts" other than "[t]he affidavit required by [ARCP 4(f)]" to show how the Millers had engaged in "diligent inquiry".

And on the *alter-ego* issue, the court said simply that the Corporations

> have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities

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[23] Miller I, 924 F.2d at 145, 147. *See* Alamo's Cir. Ct. App. at 112 (notice of appeal in *Miller I*).

[24] 924 F.2d at 147 (emphasis supplied). The phrase "noted in passing" is peculiarly apt, because the passage addressing ARCP 4(f) is clearly *dicta* in light of the court's subsequent treatment of the *alter-ego* question.

> constituted an entry of appearance by Tony Alamo.[25]

The court did not, however, resolve the inconsistency between its statements that "none of the individuals filed an answer" and "the entry of appearance by [the Corporations] constituted an entry of appearance by Tony Alamo".[26] Neither did the court explain how a *default* judgment against Alamo was proper when "the entry of appearance by [the Corporations] constituted an entry of appearance by [him]" prior to the alleged default.

IV. The *post*-trial, *post*-appeal motions and the second appeal. On 21 October and 12 November 1991, respectively, Alamo moved the District Court under FRCP 60(b)(4) and 65 to set aside the default judgment as void for want of *in personam* jurisdiction, and for a preliminary injunction with respect to execution of the judgment the Millers had obtained.[27] Alamo also requested a hearing, offering to prove that:

> • from filing of the complaint on 12 October 1988 through the Clerk's entry of default against Alamo on 9 August 1988, the Millers had made only one unsuccessful mailing each to Alma, Arkansas, and Saugus, California;[28]

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[25] 924 F.2d at 148.

[26] *Id.* at 145, 148. The Corporations filed answers denying all liability. *Ante*, page 5. If these answers were "appearances" for Alamo perforce of the Corporations' *alter-ego* status, then *ex necessitate* Alamo filed an answer, too.

[27] Alamo's Cir. Ct. App. at 117, 179. The motion for preliminary injunction relied on the motion to set aside, as "[s]aid motion propounds * * * grounds requiring the setting aside of the default entered against Alamo and the return of all property seized pursuant to said default judgment". *Id.* at 185.

[28] 24 October 1988 (sent back marked "Not at This Address Return to Sender") and 6 June 1989 (sent back marked "Return to Sender Not presently at this Address"), respectively.

- the Millers had not requested the Postmasters in Alma or Saugus to provide forwarding addresses for Alamo;[29]
- the Millers had retained no private investigator or process server, or taken other action, to locate Alamo in Arkansas, California, or anywhere else;[30]
- for years, the Millers had known about the church in Saugus, and were admittedly aware on 19 June 1989 of "indications that Mr. Alamo is operating out of" that facility and "has recently been there or will be returning there";[31]
- from at least 26 October 1988 to late April 1989, Alamo was regularly and openly at the church in Saugus;[32]
- on 3 April 1989, Alamo was personally served with process in a pending California civil case at 13136 Sierra Highway, Saugus, California, which address the process server described as Alamo's "Home";[33] and
- based on a check of official records in California, Alamo had no reason to believe he was a "fugitive from justice" when he left that State for Las Vegas, Nevada, in late April, 1989.[34]

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[29] As they had done for other individual defendants. *See ante*, page 7.

[30] As they had promised to do in their motion for a continuance of 14 February 1989. *See ante*, page 4.

[31] *See ante*, page 6 & note 13.

[32] Alamo's Cir. Ct. App. at 155-78, 207-20.

[33] *Id.* at 148-53, 204-06.

[34] *Id.* at 154, 204-12. In opposition to Alamo's motion, the Millers conceded that their case "d[id] not rest on any allegation that Mr. Alamo was actually aware that the authorities were looking for him from October, 1988 through July, 1989". *Id.* at 222. They also admitted that, "[w]hile evidence that investigators for Los Angeles County could not locate Mr. Alamo

On 11 February 1992 the District Court denied both of Alamo's motions,

> conclud[ing] that neither an evidentiary hearing nor further argument is required. * * * [T]he Eighth Circuit in [*Miller I*] has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo.[35]

On 18 February 1992 Alamo moved the District Court under FRCP 69 for a determination of who owned certain of Alamo's and the Corporations' personal and business records of which the Millers were in possession as a result of the execution of the judgment against Alamo. Alamo contended that these records were rightfully his and not the Millers', and that he needed the records to defend himself in other on-going civil and criminal litigation. The District Court denied the motion because Alamo "failed to cite any legal authority for his request".[36]

On a consolidated appeal, the Circuit Court affirmed, saying only that "[t]he district court's rulings are clearly correct".[37]

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Miller II's affirmance of the District Court's denial of Alamo's FRCP 60(b)(4) motion on the authority of *Miller I* deprived Alamo of due process of law, because *Miller I* is

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between October, 1988 and April, 1989 would tend to show that Mr. Alamo was not so easy to find as he now lets on, *the current record does not show that to be a fact*". *Id.* at 223 (emphasis supplied; footnote omitted).

[35] Pet. App. at 6a.

[36] *Id.* at 10a.

[37] *Id.* at 2a.

inapplicable or void as to him. *Miller I* can bind only parties to that appeal and their privies, and only as to matters adjudicated therein.[38] But Alamo did not personally appeal or appear in *Miller I*.[39] And the Corporations did not appeal the default judgment.[40] Thus, properly to address Alamo's FRCP 60(b)(4) motion, the District Court and the Court of Appeals needed to decide, *but instead avoided even investigating*, whether he was privy to *Miller I* at all, and (if so) how its rulings affected him. That inquiry would have exposed *Miller I* as a four-headed judicial Frankenstein's monster "that conflicts with applicable decisions of this Court"[41] and offends the first principles of due process.

First, *Miller I's* affirmance of the District Court's finding that the Corporations were Alamo's *alter egos*[42] cannot bind Alamo. For under *Zenith Radio* that finding – without service on or appearance by him – binds only them.[43] Thus, *Miller I's* extrapolation of the District Court's *alter-ego* finding to Alamo is necessarily *void* as to him.

Second, as a product of the *alter-ego* theory, *Miller I's* ruling that "the entry of appearance by the [Corporations] constituted an entry of appearance by Tony Alamo"[44] also constitutes a *void* judgment under *Zenith Radio*. Even worse, were this ruling correct its effect would be to sanction a logically and legally impossible

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[38] "[A] court cannot conclude all persons interested by its mere assertion of its own power." Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29 (1917).

[39] *See* Miller I, 924 F.2d at 146, 147.

[40] *Id.* at 145, 147.

[41] Rule 10.1(c) of the Rules of the Supreme Court of the United States.

[42] 924 F.2d at 148.

[43] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

[44] 924 F.2d at 148.

"*non*-default default judgment" against Alamo, which must be *void* for want of jurisdiction under *Hovey*[45].

Third, Miller I stated that Alamo was served under ARCP 4(f).[46] If the Corporations had standing, *independent* of their *alter-ego* status, to contest the issue, this statement is a holding, but binds only them.[47] If, conversely, they had standing only *because of* that supposed status, *Miller I's* ruling that "the entry of appearance by the [Corporations] constituted an entry of appearance by Tony Alamo"[48] rendered its "ruling" on the ARCP 4(f) issue moot and mere *dicta*. Moreover, even if not moot or *dicta*, under *Zenith Radio* this "ruling" could bind only the Corporations; and its extrapolation to Alamo is *void*.

And fourth, Miller I claimed that the Millers were entitled to employ ARCP 4(f) to serve Alamo by publication, because they had had "difficulty in locating [him] and efforts to serve him".[49] In fact, the Millers' "efforts" were so insubstantial as to render their (mis)use of ARCP 4(f) a violation of due process, and any judgment based on such service *void* for want of jurisdiction.

Moreover, *Miller II's* affirmance of the District Court's refusal even to investigate the ownership of Alamo's records palpably deprived him of due process.

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[45] Hovey v. Elliott, 167 U.S. 409 (1897).

[46] 924 F.2d at 147-48.

[47] If Alamo was not a party or in privity with a party to the first appeal, he cannot be bound by *Miller I's* judgment against the Corporations simply because both he and they (according to the supposition in the text) had standing to raise the ARCP 4(f) issue.

[48] 924 F.2d at 148.

[49] *Id.* at 147.

I. With respect to Alamo's status as the *alter ego* of the Corporations, *Miller I* is void as to Alamo under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

The *alter-ego* issues presented here are important and recurring ones that demand this Court's attention, not only for Alamo's sake but also to provide guidance in other litigation. *Zenith Radio* remains the controlling precedent.[50] There, HRI (a subsidiary of non-party Hazeltine) sued Zenith. HRI and Zenith stipulated that HRI and Hazeltine were "one and the same company", thereby "eliminat[ing] the necessity for Zenith to * * * pierc[e] the corporate veil". Zenith then counterclaimed against HRI, but neither named Hazeltine as a party nor served it with the counterclaim. When Zenith sought a judgment against Hazeltine, the latter filed a "special appearance". Based on the stipulation and its own finding that Hazeltine and HRI "would be considered as one entity", the trial court entered judgment against both HRI and Hazeltine, "thereby rejecting Hazeltine's objection that the court was without jurisdiction over it".

Concluding that the judgment against Hazeltine must be vacated, this Court explained

> that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. * * * The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. * * *
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> Here, Hazeltine was not named as a party, was never served and did not formally appear

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[50] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-11 (1969). All quotations in the following section of the petition are from these pages in *Zenith Radio*.

> at the trial. Nor was the stipulation an adequate substitute for the normal means of obtaining jurisdiction over a person or a corporation. * * *
>
> Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos; **but absent jurisdiction over Hazeltine, that determination would bind only HRI.*** If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity ***and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.*** But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue, ***but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.***[51]

Here, Alamo did not personally participate in the original District Court proceedings or the first appeal (unlike Hazeltine, which filed a special appearance, and then appealed). Alamo was named as a defendant – but this could not confer *in personam* jurisdiction on the District Court, absent his voluntary appearance or valid service of process. And Alamo was not properly served under ARCP 4(f).[52] So, he is in a position at least as strong as Hazeltine's.

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[51] ***Bold-face emphasis*** supplied; footnotes omitted.

[52] Alamo did not appear in the District Court to challenge purported ARCP 4(f) service, and therefore is not bound by any (non-existent) jurisdictional ruling of that court that he failed to appeal. Furthermore, the statements in *Miller I* on the ARCP 4(f) issue are only *dicta*. Thus, the question of improper service remained open for determination on Alamo's FRCP 60(b)(4)

Here, the District Court decided the *alter-ego* issue after a trial between the Corporations and the Millers, but without Alamo's participation.[53] Under *Zenith Radio*, "absent jurisdiction over [Alamo], that determination would bind only [the Corporations]". Furthermore, if, after litigating the *alter-ego* issue, the District Court "had decided that [the Corporations] and [Alamo] were one and the same entity and that jurisdiction over [the Corporations] gave the court jurisdiction over [Alamo], perhaps [Alamo's] appearance before judgment with full opportunity to contest jurisdiction would [have] warrant[ed] entry of judgment against [him]. But that is not what occurred". To the contrary:

- The District Court never considered, let alone decided, "that jurisdiction over [the Corporations] gave the court jurisdiction over [Alamo]", because it erroneously assumed Alamo had been served under ARCP 4(f). And,

- Alamo did not "appear[] before judgment with full opportunity to contest jurisdiction [predicated on the theory of *alter egos*]", because neither the Millers nor the District Court advanced that theory during the proceedings; and neither Alamo nor the Corporations could reasonably have predicted that *Miller I* would suddenly seize upon it on appeal. Rather, as was his right, Alamo withheld his appearance in reliance on the insufficiency of service under ARCP 4(f), the *only* jurisdictional predicate of which he, the Millers, and the District Court were aware.[54]

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motion; and therefore the impropriety of service may be assumed *arguendo* for the purposes of this part of the argument.

[53] In *Zenith Radio*, Zenith and HRI stipulated to that issue. But this is a distinction without a difference, as stipulations "are to be considered facts on the trial, without further evidence". United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965).

[54] "No person is required to answer in a suit on whom process has not been served." Webster v. Reid, 52 U.S. (11 How.)

In *Zenith Radio*, although Hazeltine appeared and the trial court "reject[ed] Hazeltine's objection that [it] was without jurisdiction over [Hazeltine], Hazeltine was *not* "foreclose[d]" on the question of *in personam* jurisdiction, because it "ha[d] never had *its* day in court on the question of whether it and its subsidiary should be considered the same entity for [jurisdictional] purposes".[55] Here, where Alamo *never* appeared, where the District Court *never* addressed the issue of jurisdiction premised upon *alter-ego* status, and where the issue arose only on an appeal in which Alamo did *not* participate (again, as was his right were ARCP 4(f) service defective), Alamo has unquestionably *not* "ha[d] *his* day in court" – and for the District Court on Alamo's FRCP 60(b)(4) motion and the Court of Appeals in *Miller II* to hold otherwise deprived him of due process of law.[56]

437, 459-60 (1851). Absent service, "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds". Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982). And "a judgment rendered *in personam* against a defendant without jurisdiction of his person is * * * void", and "a nullity". Wetmore v. Karrick, 205 U.S. 141, 149 (1907); Walden v. Craig's Heirs, 39 U.S. (14 Pet.) 147, 154 (1841).

[55] *Zenith Radio* denied that Hazeltine could be deemed to have "ha[d] *its* day in court" simply because *HRI* stipulated that Hazeltine was its *alter ego*, or because (*absent* Hazeltine as a party) "Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*". "[A]bsent jurisdiction over Hazeltine", this Court held, "that determination would bind *only HRI*". *See also* Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25, 30 (7th Cir. 1967).

[56] *E.g.*, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979)("violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard").

II. Either *Miller I's* ruling that Alamo had appeared in the District Court through the *alter-ego* Corporations rendered the default judgment void; or Federal Rule of Civil Procedure 55 is unconstitutional as applied.

Besides running afoul of *Zenith Radio*, *Miller I's* theory of Alamo's vicarious representation by the *alter-ego* Corporations crashes head-on, with logical and legal fatality, into the core principle of due process: the right to notice and hearing "at a meaningful time and in a meaningful manner".[57]

Under *Miller I's* vicarious-representation theory, "the entry of appearance by th[e Corporations in the District Court] constituted an entry of appearance by Tony Alamo".[58] But this entry, *denying all liability*, occurred *months before* the Millers sought Alamo's default.[59] During that time, the Corporations (and, under *Miller I's* theory, *Alamo* too) neither had "failed to plead or otherwise defend",[60] nor were subject to any sanctions on the issue of liability,[61] and therefore were not conceivably in default, even had they failed to appear at a hearing on that issue.[62] But the District Court held no such hearing –

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[57] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[58] 924 F.2d at 148.

[59] *See* Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 3, 8, 10, *in* Alamo's Cir. Ct. App. at 4.

[60] Fed. R. Civ. P. 55(a).

[61] Later, the Millers unsuccessfully sought a default against the Corporations, but did obtain sanctions excluding the latters' witnesses from the hearing on the *alter-ego* issue. Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 63, 65, 103, *in* Alamo's Cir. Ct. App. at 5, 7.

[62] *E.g.*, Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (FRCP 55(a) "does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also * * * be present in court when the case is called for a

instead, *it **excluded** the Corporations from the later default hearing on damages; and, after finding the Corporations to be Alamo's* alter egos, *let stand the earlier **default** against him.*

In *Hovey* v. *Elliott*,[63] this Court asked

> whether a court * * * has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing * * * . The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

The Court then asked

> whether a judgment based upon the exercise of such an assumed power is void for want of

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trial. * * * When [the defendant] by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him"). Archawski v. Hanioti, 239 F.2d 806, 807 (2d Cir. 1956) (party's "failure to appear [at trial] * * * was not properly speaking a default and did not admit all the * * * allegations of the libel. His answer had put all these allegations in issue and [other parties] were accordingly put to their proof").

[63] 167 U.S. 409, 413-14, 444-45, 446 (1897). *Hovey* involved entry of a decree that a bill be taken *pro confesso*, as punishment for an alleged contempt of court. *Id.* at 411-12. Here, the default entered against Alamo involved *no* purported sanction; so the relief he requests follows *a fortiori* from *Hovey*.

> jurisdiction * * * . It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void * * * [T]he judgment [*sub judice*] was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or be heard in his defense?
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> * * *
>
> There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files.

Mutatis mutandis, this reasoning applies in both principle and practice to entry of a default without a hearing where (according to *Miller I's* theory) Alamo actually appeared.[64]

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[64] *In principle: Compare* FRCP 55(a) *with* Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)(*Hovey* "establish[es] that there are constitutional limitations upon the power of courts * * * to dismiss an action without affording a party the opportunity for a hearing on the merits"), *and with* 28 U.S.C. § 2072(a) ("rules shall not abridge * * * any substantive right"). *In practice:* Bass v. Hoagland, 172 F.2d 205, 209-11 (5th Cir. 1949) (entry of default where party not in default violates due process, and judgment set aside, following *Hovey*). *See also* Escoe v. Zerbst, 295 U.S. 490, 494 (1935)("[w]hen an opportunity to be heard is denied altogether, the ensuing mandate of the court is void"); *In re* Noell, 93 F.2d 5, 6 (8th Cir. 1937)(" 'sentence of a

Thus, when *Miller I* suddenly seized on the theory of vicarious representation, it impliedly condemned the default judgment against Alamo as void *ab initio*. Yet, *sub silentio*, *Miller I* allowed that judgment to stand – in effect, creating a new, unheard-of, and self-contradictory "***non*-default default judgment**"! This result, however, plainly deprived Alamo of due process of law.[65]

To argue that, by not appealing the default judgment,[66] Alamo, the Corporations, or both "waived" any right to object to *ex post* appellate invention of this "*non*-default default judgment" is doubly wrong: *First*, if (as *Zenith Radio* teaches) *Miller I* erred in treating the Corporations' appearances as appearances by Alamo, then Alamo "waived" nothing, because (as shown *ante*) he was not a party to the appeal, was not required to appeal, was entitled to attack the default judgment as void under FRCP 60(b)(4) at any time notwithstanding the *dicta* in *Miller I* on the ARCP 4(f) issue, and was not bound by *Miller I's* erroneous application of the *alter-ego* theory to the Corporations. *Second*, even if *Miller I* correctly held that Alamo appeared in the District Court through the Corporations, nevertheless –

- Neither that court, nor the Millers, nor the Corporations and Alamo had any inkling during the original District Court proceedings that *Miller I* would invoke a

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court pronounced against a party without * * * giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal' ", following *Hovey*); Winhoven v. United States, 201 F.2d 174, 174-75 (9th Cir. 1952) (judgment entered without right to hearing denies due process and is void).

[65] *Cf.* Wetmore v. Karrick, 205 U.S. 141, 160 (1907)(entry of new judgment against party without opportunity to be heard violates due process); Warner v. Godfrey, 186 U.S. 365, 377 (1902)(allowing amendment of bill to assert new basis for relief, but precluding defendants from interposing defense, violates due process).

[66] *See* 924 F.2d at 147.

theory of vicarious representation "out of the blue" on appeal.[67]

- Alamo proceeded on the good-faith beliefs that service under ARCP 4(f) was ineffective, that the presence of his supposed *alter-ego* Corporations did not give the District Court *in personam* jurisdiction over him (*Zenith Radio*), and that he did not need to appeal but instead could challenge the default judgment under FRCP 60(b)(4) later on. And,
- Alamo lacked *pre*-appeal notice that he might be held to have appeared through the Corporations, and therefore had no meaningful opportunity to consider whether to appeal the default judgment.

These facts show anything but a "waiver" of due-process rights.[68]

In the alternative, if Federal Rule of Civil Procedure 55 sanctions *Miller I*'s "*non*-default default judgment", then that rule is unconstitutional as applied.

III. With respect to purported service of process on Alamo under Arkansas Rule of Civil Procedure 4(f), *Miller I* is void, because its statements on that issue are only *dicta*.

The lower courts were on no firmer ground to rely on *Miller I* with respect to service of process on Alamo under

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[67] Indeed, a theory of vicarious representation was totally inconsistent with the course of action followed: *viz.*, the Millers sought to serve Alamo personally under ARCP 4(f); the Corporations answered, but default was entered against Alamo anyway; and the Corporations were precluded from participating in the default hearing on damages.

[68] To overcome the strong presumption against the waiver of constitutional rights, it must be "clearly established" with "circumstances * * * clear and compelling" that there has been "an intentional relinquishment or abandonment of a known right or privilege". Brookhart v. Janis, 384 U.S. 1, 4 (1966); Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

ARCP 4(f). For *Miller I's* language on this issue is only *dicta*.

Alamo did not appeal in *Miller I*. If the Corporations did not vicariously represent him under an *alter-ego* theory of *in personam* jurisdiction (as Alamo has shown *ante*), then they lacked standing to appeal the question of personal service on him under ARCP 4(f); and the Circuit Court therefore lacked jurisdiction to opine on the matter.[69] Conversely, if the Corporations did vicariously represent Alamo, then (as *Miller I* itself said) "the entry of appearance by these entities [in the District Court] constituted an entry of appearance [there] by Tony Alamo" months before the Millers applied for an ARCP 4(f) "warning order".[70] Inasmuch as that rule allows service *only* when the "whereabouts of a defendant remains *unknown*",[71] substituted service on Alamo was never necessary or proper (he being present in court through the *alter-ego* Corporations under the assumption of vicarious

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[69] *See, e.g.*, Carr Enterprises, Inc. v. United States, 698 F.2d 952, 953 (8th Cir. 1983)(corporation may not assert rights of individual); Tileston v. Ullman, 318 U.S. 44, 46 (1943)(appeal "must be dismissed" where appellants lack standing).

[70] The Corporations answered on 16 November 1988, and 27 and 28 March 1989. Miller v. Tony and Susan Alamo Fd'n, No. 88-2206 (W.D. Ark.), Docket Nos. 3, 8, 10, *in* Alamo's Cir. Ct. App. at 4. The Millers filed their first affidavit in support of ARCP 4(f) service on 21 June 1989. *Id.*, Docket No. 16, *in* Alamo's Cir. Ct. App. at 4.

[71] Pet. App. at 23a (emphasis supplied). *See* Smith v. Edwards, 279 Ark. 79, 82, 648 S.W.2d 482, 484 (1983). Arkansas' rules of substituted service are mandatory, must be strictly construed, and require exact compliance. *E.g.*, Sims v. Prescott Feed Mills, Inc., 286 Ark. 22, 23, 688 S.W.2d 743, 744 (1985); Edmonson v. Farris, 263 Ark. 505, 508, 565 S.W. 2d 617, 618 (1978). *See also* Galpin v. Page, 85 U.S. (18 Wall.) 350, 368 (1874)(when "constructive service of process by publication is substituted in place of personal citation, * * * every principle of justice exacts a strict and literal compliance with the statutory provisions").

representation). And the issue of such service therefore became moot and nonjusticiable as soon as *Miller I* denoted the Corporations Alamo's *alter egos*.[72] Thus, in either event, *Miller I's* comments on the ARCP 4(f) issue were only *dicta*. These *dicta*, however, could not foreclose the District Court from plumbing the sufficiency of ARCP 4(f) service on Alamo's Rule 60(b)(4) motion. And to the extent that the District Court and *Miller II* relied on these *dicta* to deny that motion, they deprived Alamo of due process of law.

IV. If Arkansas Rule of Civil Procedure 4(f) sanctions service of process by publication under the facts of this case, it violates due process.

Finally, *Miller I* misperceived the key facts on the ARCP 4(f) issue when it wrongly related in *dicta* that "[t]he affidavit required by this Rule * * * recites in great detail the [Millers'] difficulty in locating Alamo and efforts to serve him".[73] And the District Court and *Miller II* rashly relied on this language to deny Alamo an evidentiary hearing on his FRCP 60(b)(4) motion. For, if the Millers' affidavit was sufficient to allow service by publication under ARCP 4(f), then (as applied) that rule deprived Alamo of due process.

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[72] By upholding the District Court's finding on the Corporations' *alter-ego* status and applying the theory of vicarious representation, *Miller I* excluded any rational basis for finding simultaneous ARCP 4(f) jurisdiction, and mooted that issue. *See, e.g.*, Tiedeman v. Chicago, M., St. P. & P.R.R. Co., 513 F.2d 1267, 1273 (8th Cir. 1975) (decision on one issue can moot other issue). At that point, the *Miller I* court lost jurisdiction to "decide" the issue. *Compare* Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1983), *with* Bishop v. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n, 686 F.2d 1278, 1283-84 (8th Cir. 1982).

[73] 924 F.2d at 147.

"[J]udgments *in personam*, obtained *ex parte* against * * * absent parties, upon mere publication of process * * * [can] be the constant instruments of fraud and oppression."[74] That ARCP 4(f) mandates "diligent inquiry" prior to publication of a "warning order" is not enough. Arkansas itself recognizes that, if *true diligence* is not required to ascertain a defendant's "last known address", a "long-arm" statute is unconstitutional.[75] And

> process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. * * *
>
> * * * Where the names and * * * addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.[76]

Here, the record – in which "the facts essential to the exercise of [ARCP 4(f)] jurisdiction must appear", lest "a judgment in the proceeding [be] void"[77] – refutes any notion that the Millers experienced "difficulty in locating Alamo and efforts to serve him"[78] that was the product of something other than their own sloth, and thereby attests that they engaged in no *constitutionally sufficient* inquiry. In a period of almost *eight months*, when they had every reason to believe Alamo was in Saugus, the Millers made

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[74] Pennoyer v. Neff, 95 U.S. 714, 726 (1878).

[75] *See* Halliman v. Stiles, 250 Ark. 249, 255, 464 S.W.2d 573, 577 (1971).

[76] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316, 318 (1950), *followed in* Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962). A non-party's mere knowledge that court-proceedings are taking place is not enough. New York v. New York, N.H. & H.R.R., 344 U.S. 293, 296-97 (1953).

[77] Davis v. Schimmel, 252 Ark. 1201, 1213, 482 S.W.2d 785, 791-92 (1972). *Accord*, Galpin v. Page, 85 U.S. (18 Wall.) 350, 371 (1874).

[78] 924 F.2d at 147.

but three mailings: twice to the *outdated* address in Alma (28 October 1988 and 26 June 1989), and only once to Saugus (6 June 1989). Also, the Millers clearly did not comply with what must be the constitutional minimum for ARCP 4(f) by mailing to Alma on 26 June 1989, when their mailing of 28 October 1988 to that location had been returned "Not at This Address", and when on 19 June 1989 they received the return of their Saugus mailing of 6 June 1989, indicating Alamo "ha[d] recently been there or w[ould] be returning there".[79]

Moreover, nothing evidences that Alamo ever "evaded" service by refusing to accept mail.[80] Indeed, just the opposite: The first mailing to Alma was returned "Not at This Address", not refused. The second mailing to Alma was returned "Unclaimed" and "postage due", not refused.[81] And the mailing to Saugus was not refused, either, but returned "Not presently at this address", from which the Millers' own attorney concluded "that Mr. Alamo ha[d] recently been there or w[ould] be returning there, and that his whereabouts [were] known to one or more individuals at the * * * Church".[82] No one could

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[79] *See* DiCesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703, 704-05 (W.D. Pa. 1979)("[w]hen put on notice [defendant] had moved * * * [plaintiff] was required to make at least a minimal effort to obtain his new address").

[80] *Contrast, e.g.*, Nikwei v. Ross School of Aviation, Inc., 822 F.2d 939, 941-43 (10th Cir. 1987).

[81] *See* Meeks v. Stevens, 301 Ark. 464, 785 S.W.2d 18 (1990) (return of certified mail "unclaimed" does not constitute refusal or create a presumption of refusal); Recreational Properties, Inc. v. Southwest Mortgage Service Corp., 804 F.2d 311, 314-15 (5th Cir. 1986)("no requirement that the addressee pay for postage prior to receiving [mail]", and "did not have to accept the envelopes").

[82] Significant is that a litigant in another case was able to serve Alamo at the Saugus church during April, 1989, and that the Millers never used the Saugus address as the starting-point for a search. *See* Smith v. Edwards, 279 Ark. 79, 82, 648 S.W.2d

"infer[] evasion on the part of [Alamo] because of the[se] repeated, *though faulty*, attempts at service" by the Millers.[83]

In short, if the Millers' attempts at service were no "mere gesture", nothing would be. And if such a "mere gesture" is "diligent inquiry" under ARCP 4(f), then application of that rule deprived Alamo of due process.

V. The lower courts' refusal to investigate the ownership of Alamo's personal and business records deprived him of due process.

Finally, the lower courts' treatment of Alamo's motion as to the records further exemplifies their disdain for the rudiments of due process. The records were not sold as personalty to the Millers on execution of the judgment against Alamo. Rather, the Millers contended that Alamo had abandoned the records on certain real property they purchased pursuant to the judgment. But that contention raised a complex *factual* issue of Alamo's intent under Arkansas common law which the District Court refused even to investigate.

Instead, the District Court (affirmed in *Miller II*) glibly denied Alamo's motion on the ground that he "failed to cite any legal authority for his request".[84] Alamo, however, knows of no authority holding that an individual irretrievably loses his right to attempt to prove ownership of personal records and business records of corporations declared to be his *alter egos* simply because he has had a default judgment entered against him for damages, and notwithstanding that execution on that judgment has *not* involved any purported sale of the records. To the contrary: the entire *corpus* of due-process jurisprudence

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482, 484 (1983)(treating similar facts as evidence that party "did not make a diligent search").

[83] Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297, 303 (7th Cir. 1991)(emphasis in the original).

[84] Pet. App. at 10a.

affirms that an individual may not be finally deprived of property until he has had a *meaningful* hearing on his claim.

CONCLUSION

As applied to Alamo, *Miller I* is a judicial travesty. The Circuit Court treated Alamo as having *personally* been found to be the Corporations' *alter ego* – although *he* was *never* served, did *not* appear in the District Court, *never* litigated the *alter-ego* issue, and did *not* appeal. The Circuit Court ruled that Alamo *did* appear in the District Court through the *alter-ego* Corporations – although the latter court had entered a *default* judgment against him for *failing* to appear (which **non-default default judgment** the Circuit Court implicitly condoned). And the Circuit Court concluded that the *alter-ego* Corporations had standing to raise (and lose) the issue of ARCP 4(f) service – although, if Alamo had appeared in the District Court through them (as the Circuit Court said he had) he could not possibly have been subject to service by publication at all.

Worse yet, *Miller II* is a judicial dereliction. For, confronted with an unanswerable critique of *Miller I's* outrageous deficiencies in due process in the light of *Zenith Radio* and *Hovey*, the Circuit Court simply looked the other way in an unpublished opinion that avoids even acknowledging the issues, let alone addressing the merits – thus leaving the deprivations of Alamo's due-process rights not only unrectified but also unscrutinized. The court also left unscrutinized the issue of ownership of key records Alamo needs to defend himself in on-going litigation – thus setting the stage for further deprivations of due process.

And most serious of all, unless reversed, *Miller I* and *Miller II* will provide the most perverse of precedents in the important provinces of *alter-ego* jurisprudence, default judgments, and due process, potentially perverting a plenitude of future cases.

For these compelling reasons, this Court should grant Alamo's petition and issue a writ of certiorari.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22111
(703) 791-6780

Counsel of Record for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1447WA
No. 92-2205WA

Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; James Miller,	*	
Appellees,	*	Appeals from the United States District Court for the Western District of Arkansas.
v.	*	
Tony Alamo, also known as Tony Fernando, also known as Tony Fernando Alamo, also known as Bernie Lazar, also known as Bernie Hoffman, also known as Bernie Lazar Hoffman, also known as Boris Lazar, also known as Papa Tony, individually and as officer & director of Tony & Susan Alamo Foundation & Music Square Church,	*	[UNPUBLISHED]
Appellant.	*	

Submitted: November 12, 1992

Filed: November 19, 1992

Before FAGG, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Tony Alamo appeals adverse rulings of the district court in these combined cases. Having reviewed the record and the parties' briefs, we conclude the issues raised on appeal do not require further consideration. The district court's rulings are clearly correct. We affirm the district court. *See* 8th Cir. R. 47B.

[2] A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

On October 21, 1991, Tony Alamo (Alamo) filed a motion to dismiss or set aside the default judgment entered on April 27, 1990, and for return of property sold as a result of that judgment. The afternoon of November 12th, Alamo filed a motion for temporary restraining order (TRO) along with a motion for preliminary injunction. He sought to restrain the U.S. Marshal, the plaintiffs and the buyers of the auctioned property from disposing of, degrading the value of or selling any property obtained as a result of this case until the Court could rule on his motion to set aside and vacate the default judgment. The Court held a telephonic conference the morning of November 14th.

By order filed on November 15th reflecting the rulings announced at the conference, the Court denied the November 12th motion for TRO and noted the parties had stipulated that there would be a merger of the motion for preliminary injunction with a decision on the merits of the motion to set aside. Alamo was directed to file his brief by November 25th on whether the [2] holdings in *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143 (8th Cir. 1991) (*Miller*) that the district court had

personal jurisdiction of Alamo and that the corporate entities were his alter egos are dispositive of his motion with replies to Alamo's brief to be filed by December 2nd. The Court stated that once all the briefs were filed a review of the file would be made to determine if a ruling could be made on the record without additional testimony or argument.

On November 22nd, plaintiffs filed a response to the motion for return of property. They argue that if Alamo is correct in his assertion that the property is his, then he is admitting that the Court was correct in findings that the corporations were acting as his "alter egos." They continue that if Alamo is instead arguing that the corporations are distinct and separate entities from him, then he is not the proper party to demand the property's return.

On November 26th, Alamo filed his brief on the Eighth Circuit decision. He argues that the issues presented by his October 21st motion were not litigated in the Eighth Circuit, that this Court is not prohibited from addressing the merits of a Civil Procedure Rule 60(b) motion after an appeal, that he would be denied due process if the prior judgment is considered binding on him since he was a non-party, that there is no privity between himself and the corporate entities, that the doctrine of res judicata does not apply to a direct attack on the judgment, that the corporate entities lacked standing to raise the issue of whether there was [3] jurisdiction over him, and that even if plaintiffs had complied with Arkansas' provision for service by publication, such rule was constitutionally deficient as applied in this case.

He filed his response on November 27th to Plaintiffs' November 12th objection and motion to strike exhibits that were attached to his October 21st motion. He asserts that the exhibits constitute an offer of proof of what evidence would be presented at an evidentiary hearing.

On November 29th, he filed a reply on the motion for return of property that if the default judgment is set aside, then plaintiffs have no legal right to the property regardless of whether he or the corporate entities own the property. That same date, he filed a supplement to his November 26th brief adding the argument that his liability for the damages awarded to plaintiff was not briefed or considered on appeal.

Plaintiffs filed a combined response to the motion to dismiss/motion to set aside and vacate default judgment and their brief regarding the Eighth Circuit decision. The brief first deals with Alamo's argument that the claims against him should be dismissed since he was not served within 120 days and then discusses the service by the warning order. Besides responding to the points raised by Alamo, plaintiffs discuss the preclusive effects of the prior litigation, his failure to meet the burden of proof, and the issues of waiver and estoppel due to Alamo's affirmative misconduct.

[4] Alamo filed a reply on December 5th attaching transcript portions of the detention hearings held in Alamo's criminal case. That same date, plaintiffs filed an opposition to Alamo's November 29th supplemental brief on both timeliness and substantive grounds.

On December 6th, plaintiffs filed a reply on the motion for return of property. Their surreply on the

motion to vacate was filed on December 12th attacking the admissibility of the exhibits to Alamo's December 5th pleading.

The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so. The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

[5] On December 6th, plaintiffs filed a motion to strike the appearance of the corporate entities through Roy Gean, III. They ask that all parties be relieved from serving anyone purporting to represent Music Square Church, Inc. and/or Tony and Susan Alamo Foundation since those entities have no existence separate from Alamo. In particular, plaintiffs are concerned that the reappearance of Gean in the certificates of service might be used by Alamo as a waiver by plaintiffs or demonstrating inconsistent action by the Court. Attached as an exhibit is Gean's February 25, 1991 letter explaining why

he would no longer be participating in the proceedings. No response to this motion has been filed. Besides the points made in plaintiffs' motion, the Court notes that Gean did not participate in the November 14th telephonic conference. Plaintiffs' arguments and concerns are well taken and the motion to strike the appearance of the previously dismissed corporate defendants will be granted.

Finally, it appears that there is an outstanding motion filed by plaintiffs on August 1st for attorney's fees and costs under the Equal Access to Justice Act (EAJA) against the United States. This motion is referred to U. S. Magistrate Judge Stites for recommended disposition.

Accordingly, Alamo's October 21st motion to dismiss or, in the alternative, to set aside and vacate default judgment and for return of property is denied. As Alamo's motion for preliminary injunction was merged with the merits of the October 21st motion, the November 12th motion for preliminary injunction is denied. **[6]** Since the exhibits do not affect the Court's ruling, plaintiffs' November 12th motion to strike exhibits is denied. Plaintiffs' December 6th motion to strike the appearance of the previously dismissed corporate defendants is granted. Plaintiffs' August 1st motion for attorney's fees and costs under EAJA against the United States is referred to Magistrate Judge Stites for recommended disposition. Unless the parties notify the Court in writing within 15 days from the file-date of this order of any outstanding motion not addressed by this order, such motion will be deemed moot.

IT IS SO ORDERED this 11 day of February, 1992.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

U. S. DISTRICT COURT
WESTERN DIST.
ARKANSAS
FILED
FEB 12 1992

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 2-12-92 by MSJ

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

(Filed April 27, 1992)

On February 18th, Alamo filed a motion for determination of ownership and the release of records seized by the U.S. Marshal Service during the execution of the money judgment in favor of the plaintiffs. This motion is supported by exhibits. Plaintiffs responded on February 25th and also moved for imposition of sanctions. Alamo filed a reply to his motion that also responded to the request for sanctions on February 28th. Plaintiffs filed a reply to their sanctions motion on March 5th. Alamo filed a supplemental response on sanctions on March 13th and plaintiffs filed a sur-reply on April 2nd.

On October 17th, a motion for order to release records so they could be used in another case was filed at Alamo's request. After the matter was referred to Magistrate Judge Stites for disposition, the motion was denied by order filed on October 21st on the ground that no legal authority for the unusual request had been presented. Plaintiffs argue that in light of the October [2] 21st decision, Alamo should be assessed sanctions for trying to relitigate this issue.

The records at issue were left on properties that were executed upon in February of 1991 and later sold to plaintiffs at execution sale in this case. Alamo has once again failed to cite any legal authority for his request. The motion for determination of ownership of records and for order of release is denied. However, the Court is persuaded that sanctions are not warranted and so plaintiffs' motion for imposition of sanctions will be denied.

Finally, plaintiffs filed a third petition for allowance of attorney's fees and costs on February 26th. No response to this petition has been filed. This petition is referred to Magistrate Judge Stites for recommended disposition.

Alamo's February 18th motion for determination of ownership of records and for order for release and plaintiffs' February 25th motion for imposition of sanctions are denied. Plaintiffs' February 26th third petition for allowance of attorney's fees and costs is referred to Magistrate Judge Stites for recommended disposition.

IT IS SO ORDERED this 24 day of April, 1992.

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 4-27-92 by MSJ

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

Robert A. MILLER; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller, Appellees.

v.

TONY AND SUSAN ALAMO FOUNDATION, Appellant,

t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors;

Music Square Church, Appellant.

t/d/b/a Alamo Mini Mart, Holiness Tabernacle Christian School, Alamo of Nashville in Alma, Alamo Ready Mix, Alamo Discount Grocery, Hartford Advertising, Alamo Freight, Alamo Farms, Alamo Restaurant, Alamo Kerr-McGee Transmission Shop, Alamo DX, & End Times Books; Tony Alamo, a/k/a/ Tony Fernandoi,a/k/a Tony Fernando Alamo, a/k/a/ Bernie Lazar, a/k/a Bernie Hoffman, a/k/a Bernie Lazar Hoffman, a/k/a Boris Lazar, a/k/a Papa Tony, ind. & as officer & dir. of Tony & Susan Alamo Foundation & Music Square church; Marc Lundgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Tommy Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Carol Ann Miller, a/k/a Carol Ann [144] Landgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Susan L. Miller a/k/a Susan Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church.

No. 90-1826.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 10, 1990.

Decided Jan. 23, 1991.

Plaintiffs brought suit against four individuals and two alleged corporate entities, alleging violations of the Fair Labor Standards Act, the Davis-Bacon Act, and the Arkansas minimum wage law. Other counts alleged various common-law torts perpetrated against defendants. The United States District Court for the Western District of Arkansas, Morris Sheppard Arnold, J., ruled that corporate entities were alter egos of individual defendant, and entered personal judgment against individual defendant in the amount of $1,448,549. Corporate entities appealed. The Court of Appeals, Henry Woods, District Judge, sitting by designation, held that: (1) district court did not err in disallowing testimony of defense witnesses; (2) court properly denied motion for recusal; (3) court had personal jurisdiction over defendant under the Arkansas Long Arm Act; and (4) evidence supported finding that alleged corporate entities were alter egos of individual defendant.

Affirmed.

See also 748 F.Supp. 695.

* * *

[145]

* * *

Roy Gean, Fort Smith, Ark., for appellant.

Peter Georgiades, Pittsburgh, Pa., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

HENRY WOODS, District Judge.

The Plaintiffs, Robert A. Miller, et al., filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Foundation and Music Square Church, Inc. answered through joint counsel. None of the individual defendants answered although all were served in accordance with the applicable statute and Federal and State Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

4. Tony Alamo moved corporate assets into and out of the corporations, and between them,

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[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

at will, and without regard to any ownership interest by the corporate entities.

5. Tony Alamo appointed and removed corporate officers at his personal whim.

6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.

7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.

[146] 8. Corporate officers and boards, and the corporate form in general, were ignored by Tony Alamo.

9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia:*

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc., were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
>
> . . . .
>
> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony

> and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) The district court erred in disallowing the testimony of certain defense witnesses; (2) the district judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).

2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).

3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly,* 519 F.Supp. 1029 (D.Mass.1981); *Bradley v. Milliken,* 426 F.Supp. 929 (E.D.Mich.1977); *In Re Bokum Resources Corp.,* 26 B.R. 615

(Bkrtcy.D.N.Mex.1982). Clearly, the [147] matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D.Ark.1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark.R.Civ.P. Rule 4(f) The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order

> issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App.289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4(c)(2)(C)(i) Fed.R.Civ.P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A. § 16-4-101, *Et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(C)(1)(c) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal

or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark.R.Civ.P. which incorporates A.C.A. § 16-4-102(A)(1) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> **[148]** Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark.Code Ann. § 16-4-102(1) (1987) and ARCP Rule (e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4(f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f) applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least

two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

United States Constitution,
Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

United States Constitution,
Fourteenth Amendment

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

Arkansas Rule of
Civil Procedure 4 (f)

(f) **Service Upon Defendant Whose Identity or Whereabouts is Unknown:** (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors. (2) In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and conspicuously posted for a continuous period

of 30 days at the courthouse or courthouses of the country wherein the action is filed and by mailing by the plaintiff or his attorney of a copy of the complaint and warning order to the defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

Federal Rule of Civil Procedure 55

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

* * *

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor * * * . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment

by default has been entered, my likewise set it aside in accordance with Rule 60(b).

* * *

Federal Rule of Civil Procedure 60(b)(4)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void * * * .

Supreme Court, U.S.
F I L E D
MAR 8 1993
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No. 92-1306

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT A. MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER by CAREY MILLER; RICK MILLER; and JAMES MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court abused its discretion in refusing to hold an evidentiary hearing on a motion under F.R.Civ.P. 60(b), where the issues the movant sought to litigate under the motion had been previously raised and litigated to judgment by his co-defendants in the same case, where the co-defendants were corporations which the District Court had previously held to be sham entities operating as mere "alter egos" of the movant, and where the District Court's judgment setting aside the corporate forms had been appealed and affirmed prior to the filing of motion under Rule 60(b).

II. Whether the District Court abused its discretion in refusing to hold an evidentiary hearing on a motion under F.R.Civ.P. 60(b), where the issues the movant sought to litigate under the motion had been previously raised and litigated to judgment by the movant's co-defendants in the same case, where the co-defendants were corporations which had been twice previously adjudicated in state courts to be sham entities operating as mere "alter egos" of the movant, in cases in which the movant and the corporations were all before those courts, and where the two prior state court judgments had never been appealed and had become final prior to the filing of the motion under Rule 60(b).

III. Whether, on a motion under F.R.Civ.P. 64(b), the District Court abused its discretion by refusing to hold a hearing on the issue whether the plaintiffs' efforts to

QUESTIONS PRESENTED FOR REVIEW – Continued

effect personal service upon the defendant before resorting to service by publication were sufficient to satisfy due process, where the record before the District Court overwhelmingly established: (1) the plaintiffs made several attempts to locate and serve the defendant before resorting to service by publication; (2) the defendant was a fugitive from justice at the time of service by publication and elected to remain a fugitive and suffer a default judgment rather than risk apprehension; (3) the defendant was aware of the pendency of the litigation before and after judgment was entered against him; and (4) the defendant was also aware that the plaintiffs and hundreds of others not party to the case were relying upon the finality of the judgment, but failed and refused to take any action to assert his claims of defective service until after he was apprehended by authorities, eighteen months after judgment against him was entered.

IV. Whether a party who litigates and loses on a claim that he is entitled to possession of records previously abandoned in premises seized and sold in execution upon a judgment is barred under the doctrine of *res judicata* from reasserting the same claim three months later, where he failed to appeal the initial adverse ruling, and in the interim between the first ruling and the second attempt to litigate the question the first ruling had become final and non-appealable.

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STATEMENT OF THE CASE

The appeal with respect to which the Petitioner now seeks a writ of certiorari arose as a consequence of the District Court denying a motion for relief from judgment made pursuant to F.R.Civ.P. 60(b). In his Petition the Petitioner has badly distorted the record, citing material out of context failing to note important facts which belie his contentions. To place the Petitioner's Rule 60(b) motion in the proper context, the Respondents must, therefore, review the facts from the beginning of this case.

The action was commenced on October 12, 1988, against Tony Alamo ("Alamo")[1] and two corporate entities. The corporate entities were the Tony and Susan Alamo Foundation, purportedly a non-profit corporation organized under the laws of the State of California ("Foundation"), and Music Square Church, Inc., purportedly a non-profit corporation organized under the laws of the State of Tennessee ("Music Square"). Apdx. I at 228-29.[2] These corporations are hereinafter referred to collectively as the "Alamo corporations".

---

[1] Originally, four individuals in addition to Mr. Alamo were also named as defendants. Those four were later dismissed from the case for reasons not material to this appeal.

[2] The Petitioner has not served the Respondents with an Appendix, and cites to the Appendix before the Court of Appeals. The Respondents will, therefore, also cite to "Apdx. I" to refer to the Appendix in the first appeal taken to the U.S. Court of Appeals for the Eighth Circuit (*"Miller I"*), and to "Apdx. II" to refer to the Appendix in the second appeal to that Court (*"Miller II"*).

It was specifically alleged in the Complaint that the corporate entities were vehicles through which Alamo perpetrated fraud (Apdx. at 235, ¶28), and that the corporate defendants were totally controlled by Alamo, used for his personal benefit, and that Alamo's control and domination was so complete that the corporate entities had no independent personality or existence of their own (Apdx. I at 235, ¶29).

Service of process by mail was attempted upon all defendants on October 24, 1988, pursuant to F.R.C.P. Rule 4(c)(2)(C)(ii), addressed to P.O. Box 398, Alma, Arkansas 72921. That was the address the defendants used on all of their business correspondence, and the defendants admitted this was their address, as they later argued to the District Court that this address was "known" to the plaintiffs as the address of the defendants. Apdx. I at 215:16-23. The Summons, Complaint and "Notice and Acknowledgment of Service" forms for all defendants except the Foundation were returned to the plaintiffs marked, "Not at this address – Return to sender." Apdx. at 295-301.

On November 16, 1988 an Answer was filed on behalf of the Foundation, Music Square **and Tony Alamo individually.** Apdx. at 37-38. However, counsel for the defendants subsequently contacted counsel for the plaintiffs and told them the answer on behalf of Alamo had been filed in error and advised that an amended answer would be filed. Apdx. II at 419-421. On March 27, 1988 an Amended Answer was filed by the defendants, deleting all reference to Alamo and to Music Square. Apdx. I at 57.

The plaintiffs therefore had no reason to attempt service upon Mr. Alamo between November 16, 1988 and March 27, 1988, since he had already filed an Answer. The Petitioner's references to the plaintiff's failure to attempt to locate a forwarding address for Mr. Alamo during that period, including references to an examination of the trial judge in an unrelated criminal prosecution of Mr. Alamo (Pet. at 3-5) are therefore misleading. Further, because the issue whether Judge Arnold's grant of additional time to effect service of process was not raised by the Petition on appeal to the Eighth Circuit, the issue is not preserved for further appeal to this Court, and these allegations are also immaterial.

Counsel for the Foundation then accepted service of process for Music Square, and Music Square filed an Answer on March 27, 1989. Apdx. I at 51. Hence, the Tony and Susan Alamo Foundation and Music Square Church, Inc. appeared by counsel, answered the complaint, and defended the action.

In the meantime, having been alerted to the fact that Mr. Alamo's Answer was filed in error and was being withdrawn by the attorney who filed it, the plaintiffs made a number of additional attempts to locate and serve Mr. Alamo personally. The plaintiffs attempted mail service at a second address, in Saugus, California, which was listed on some tracts published by Alamo. That service was also returned marked, "Return to Sender: Not Presently At This Address." Apdx. I at 292-301. The plaintiffs contacted Postal authorities in Alma, Arkansas in an effort to learn of any forwarding addresses for any of the other, individual defendants, who were known to be close to Mr. Alamo and who might have given some

indication of his whereabouts. The Postmaster responded that he was unable to provide any addresses. *Id.*

The plaintiffs also wrote to a law firm which had represented two of the individual defendants in a prior domestic relations case in California. The response of those attorneys was that the firm no longer represented any of the named individuals, did not know their whereabouts, and that they were also trying to find Alamo to serve him with process and could not. Apdx. at 329, 351-352.

The plaintiffs also served interrogatories upon each of the corporate defendants, seeking to learn the whereabouts of each of the individual defendants, including Mr. Alamo. The answers of the Foundation to those interrogatories indicated that the only information they had regarding the location of Alamo was that he was last known to reside at " . . . some hotel in Los Angeles." Apdx. I at 607 ¶10. The President of the Foundation further responded that no communications had been received from any of the defendants, including Mr. Alamo, so far as he could "recollect," (*Id.* at 607-609, ¶¶7, 9, 608 ¶¶17, 18, 26, 29, 32, 37), and that no W-2 or other tax forms had been issued to the individuals for the year prior to the action (*Id.* at 608 ¶¶15, 26, 37).

For its part, Music Square simply failed to respond to the plaintiffs' interrogatories at all. The plaintiffs then moved to compel answers to those interrogatories, and to again enlarge the time in which to serve the individual defendants. Apdx. I at 571-614. The District Court (per Beverly Stites, U.S. Magistrate) granted the plaintiffs additional time in which to serve the defendants. However, the court denied

the motion to compel discovery, and directed that the plaintiffs instead proceed pursuant to Rule 4 of the Arkansas Rules of Civil Procedure, as incorporated under F.R.Civ.P. Rules 4(c)(2)(C)(i) and 4(e). Apdx. at 286-288.

The plaintiffs then served Mr. Alamo by publication, in accordance with the applicable rules of civil procedure. Ark.R.Civ.P. Rule 4(f). Apdx. I at 302-322.

Throughout this entire period Alamo was a fugitive from justice. As is more fully set forth below, Mr. Alamo's fugitive status during the time the plaintiffs were trying to serve him, as well as the entire time through trial, appeal, and the plaintiffs' execution upon their judgment, was a matter of record at the time the Petitioner's motion under Rule 60(b) was filed.

Although Mr. Alamo argues that he had a "good faith belief" that he was not a fugitive from justice, he does not deny he was aware of the suit. Alamo admitted to the Court of Appeals that he was aware of the suit, but that he chose not to respond in the belief that he could challenge the judgment against him under F.R.Civ.P. 60(b) "at any time." Brief of Appellant, *Miller II*, at 22, 25-26.

After the publication period had run, none of the individual defendants appeared or otherwise responded to the complaint. The plaintiffs then filed an Application for Entry of Default and supporting Affidavit of Default (Apdx. at 324-357), and in due course a default was entered by the Clerk of the District Court against Mr. Alamo on August 17, 1989 (Apdx. at 358-363).

A hearing was then held on November 27-28, 1989 to determine the amount of Alamo's liability to the Millers.

Although the Petitioner is correct in noting that neither Mr. Alamo nor the Alamo corporations participated (Petition at 8), it is important to note that there is no allegation or proof that the defendants' failure to appear was due to a lack of notice or was the result of anything done by the District Court or by the plaintiffs.

After the hearing on the issue of the amount of Alamo's liability to the plaintiffs, the District Court deferred entry of judgment against Alamo, pending a determination of the liability, if any, of the corporate defendants.

The trial of the action against the corporations was bifurcated. The District Court determined to proceed first with a hearing on the question whether the corporate defendants were in fact entitled to legal recognition as distinct entities from Mr. Alamo, and then to try the issue of liability should the initial issue be decided favorably to the Alamo corporations. On March 6-7, 1990, the first phase of the trial of the corporate defendants was held. At the conclusion of the evidence, the District Court (Hon. Morris S. Arnold) found, *inter alia*, that in fact the corporate litigants enjoyed no existence separate and apart from Alamo, and that the corporations were shams, used by Alamo for his own purposes. Memorandum Opinion of April 19, 1990, *infra* at 46a, Judgment of April 19, 1990, *infra* at 27a. The District Court also found that the Foundation "was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo." *Id.*

Accordingly, on April 19, 1990, the District Court entered a judgment, declaring the corporate entities to be shams which were acting with respect to the Millers as

the "alter egos" of Alamo. The District Court further declared that any judgment in this case which would be entered against Alamo individually would lie against these corporate entities as well, and dismissed the corporations as parties. Judgment of April 19, 1990, *infra* at 27a.

On April 27, 1990, a money judgment was entered against Alamo and in favor of the plaintiffs in the amount of $1,448,549.00. Judgment of April 27, 1990, *infra* at 30a. Mr. Alamo never appealed this money judgment, and it became final.

The corporate litigants each appealed from the April 19, 1990 declaratory judgment. As part of their appeal the corporate defendants expressly raised and argued the issues of the sufficiency of service of process over defendant Alamo by publication (Apdx. II at 284, 292-95), as well as the collateral issue of the corporations' standing to raise this challenge to the District Court's jurisdiction over Alamo (Apdx. II at 292).

In their Brief, the Millers set forth the facts pertaining to their attempts to serve Alamo with process, the corporations' obstruction of discovery in regard to finding Alamo, and Alamo's knowledge of the litigation while he was hiding out. Apdx. I at 330-39. The Millers also briefed and argued the issue of the corporations' standing to challenge sufficiency of service upon Alamo. Apdx. I at 367-69.

Each of these issues was decided by the United States Court of Appeals on January 23, 1991. *Miller I*, *infra* at 33a. The Court of Appeals affirmed the District Court in all respects. It was specifically held that service of process by publication was correctly done and was valid, and, in

the alternative, that an appearance and defense by Alamo's "alter ego" corporate surrogates constituted an appearance by him which vitiated the need for service by publication. Id. at 33a.

The Petitioner states that the Court of Appeals did not "resolve the inconsistency" between its affirmance of the findings that none of the individual defendants filed an answer and that the entry of an appearance by Mr. Alamo's "alter ego" corporate entities constituted an entry of appearance by Mr. Alamo. Petition at 10. This falsely implies that there was or is an "inconsistency." In truth, there is nothing inconsistent about holding that Mr. Alamo entered an appearance but did not file an answer or otherwise defend, and was therefore placed in default.

Six months after the Court of Appeals affirmed the District Court, the Petitioner was finally located and arrested in Tampa, Florida. *U.S. v. Alamo*, CR-90-20008-1 (W.D.Ark. 1991). Three months after his arrest, on October 21, 1991, the Petitioner filed a motion for relief from judgment under Rule 60(b). It is the disposition of that appeal which is the subject of this Petition.

Pursuant to his Rule 60(b) motion, the Petitioner sought to re-argue the facts pertaining to service of process which were before the Court of Appeals on the first appeal. The Respondents objected to the re-argument of these facts on grounds that the issue was *res judicata* and also settled as the "law of the case." Apdx. II at 393-564. The Millers also objected to admission into evidence of

the excerpts from Judge Arnold's testimony in the criminal prosecution of Mr. Alamo,[3] unsworn statements of Alamo's followers, and like material, because they were hearsay and were otherwise not admissible under the Federal Rules of Evidence. Apdx. II at 565-77.

Although Alamo did embellish his arguments with some assertions claims not raised prior to the first appeal, he did not allege that any of the additional "facts" he wished to prove were not known to him prior to entry of the monetary judgment against him on April 27, 1990. Alamo did, however, allege that he "believed in good faith that he was not a fugitive" at the time the plaintiffs were attempting to serve him with process. This claim

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[3] At one point Petitioner was charged with threatening the life of the trial judge, the Hon. Morris S. Arnold. That charge arose as a result of statements Alamo made in publications and on audio tapes, while he was still a fugitive. Mr. Alamo's remarks referred to the entry of the judgment against him in this case, and resulted in the issuance of an additional arrest warrant for him. *United States v. Tony Alamo*, CR-90-20008-1 (W.D. Ark. 1991). The remarks of Judge Arnold quoted in the Petition here are from the transcript of the trial on that criminal charge. When the Petitioner proffered them in the District Court, the Respondents objected and moved to strike them, on grounds that one cannot disregard the actual record in a case and instead rely upon the off-hand recollections of the trial judge while being questioned in a different proceeding two years after the fact. Further, although Mr. Alamo did recite Judge Arnold's remarks in his appellate brief in this case, Mr. Alamo did not appeal Judge Arnold's order enlarging the time for the plaintiffs to serve process beyond the original 120 days allowed under F.R.Civ.P. 4(j). These remarks are, therefore, immaterial to the instant Petition.

was soundly rebutted by the record before the District Judge at the time of the motion. The District Court had previously found that Mr. Alamo was a fugitive from justice (Transcript of Court's Ruling, March 7, 1990, Apdx. II at 582), and this fact was recognized and relied upon by the Court of Appeals. *Miller I, infra* at 40a. These findings were amply supported by evidence of record:

1. One of the warrants for Alamo's arrest was for felony child abuse, issued by the State of California as a consequence of Mr. Alamo having directed a severe beating of Justin Miller.[4]

2. The District Court was asked to take judicial notice of an arrest warrant issued by the same Judge of the same District Court for Mr. Alamo, on a contempt citation previously issued by the District Court in *Elizabeth Hanford Dole v. Tony and Susan Alamo Foundation, et al.*, Civil Action No. 77-2183 (W.D. Ark.). Apdx. II at 2-4.

3. The District Court was asked to take judicial notice of the proceedings in *United States v. Tony Alamo, supra,* in which Mr. Alamo's fugitive status is discussed.

4. Exhibits introduced at the trial held in this case on March 6-7, 1990, contain explicit references by Mr.

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[4] This was one of the claims asserted in the original complaint, and judgment was ultimately entered in this case that Mr. Alamo and the corporate defendants were liable for this beating. Memorandum opinion, *infra* at 45a. The criminal charge is still pending in the State of California.

Alamo to the arrest warrants issued for him by authorities in Los Angeles County, California. Mr. Alamo discussed the arrest warrants issued for him in transcribed interviews in April, 1988, six months before this action was filed, (Michael Jackson Show, KABC Radio A.M., April 1, 1988, Apdx. II at 473-474, 478), and again in September, 1989, eleven months after this action was filed, ("Talk Radio," KLIF, September 26, 1989, Apdx. II at 498-499).

5. There was testimony of record by Robert Miller and Carey Miller regarding Mr. Alamo being a fugitive following complaints over the beating of Justin Miller. Transcript of Proceedings of November 27-28, 1989, Testimony of Carey Miller, at 117; Transcript of Proceedings of November 27-28, 1989, Testimony of Robert A. Miller at 165-166.

6. Mr. Alamo made express admissions in his own publications, in which he discussed this case and asserted that, "[state and federal agencies, prosecutors, judges and other authorities] have turned it around to where we're the bad guys (child abusers) **and fugitives from justice** and the Millers are the good guys." Tract Entitled "NAILED," Trial Exhibit No. 57, Apdx. at 517 (emphasis added).

In addition, the Respondents established before the District Court that subsequent to the affirmance of the judgment by the Court of Appeals, the plaintiffs undertook the substantial effort necessary to execute upon their judgment. As part of that effort, the plaintiffs filed several law suits in various jurisdictions in order to set aside fraudulent conveyances of property by Alamo's corporate

shells. Among those fraudulent conveyance actions were two state court actions. *Robert A. Miller, et al. v. Tony Alamo, et al.*, Civil Action No. CV90-15200 (Superior Court of the State of Arizona, In and For the County of Maricopa) ("Arizona Case"), Apdx. II at 590-618; and *Robert A. Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, No. E-90-284 (I) (Chancery Court of Crawford County, Arkansas) ("Arkansas Chancery Case"). Apdx. II at 619-34.

In each of those suits in state courts it was separately alleged, under a different count in each respective complaint, that the corporate forms of the Tony and Susan Alamo Foundation and Music Square Church, Inc. were sham corporations acting as mere "alter egos" for Alamo. See: Complaint in Arizona Case, Count II, at ¶¶16, 17, Apdx. II at 598; Complaint in Arkansas Chancery Case, Count II, at ¶¶16, 17, Apdx. II at 631. Further, in each of those cases the courts found that there had been service by publication on Alamo. Apdx. II at 550, 648. Indeed, during the proceedings on the Rule 60(b) motion, Alamo admitted through his attorney that he had been served by publication in the Arizona case. Apdx. II at 193.

In the Arizona Case the Court ultimately adjudged:

> 8. That the corporate form of Twentieth Century Holiness Tabernacle Church, Inc. and **Tony Alamo and the other defendants set forth herein** [including but not limited to Music Square Church, Inc. and the Tony and Susan Alamo Foundation] **are declared to be one and the same, and all of said defendants are merely aliases and the alter-ego of said Tony Alamo,** and any Judgments which lie against the said

> Tony Alamo lie against said defendants. Apdx. II at 552 *infra* at 59a. (Emphasis added.)

In the Arkansas Chancery Case the court found that Alamo had been served by publication, and had defaulted. Apdx. II at 648. The court also found that Alamo was a fugitive from justice (Apdx. II at 648-49), and that Foundation and Music Square were appearing in the case only as surrogates for Mr. Alamo:

> Rather than protecting their own, legitimate interests, it is apparent to the Court that these two corporate entities, previously having been found to be nothing more than the tools and an extension of Tony Alamo, have appeared in this case as surrogates for Mr. Alamo. It is the law of this state that litigation must be carried only in the name of the "real party in interest." Ark. R. Civ. P. Rule 17. Moreover, for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts of this and any state. *See: Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498 (1970). It would violate that policy to permit Mr. Alamo to remain a fugitive from justice and still appear in this case and defend through surrogate entities.

The plaintiffs further established that no appeal was taken from either the Arizona judgment or the Arkansas Chancery judgment, they had become final, and no motion to vacate either judgment ever filed by any defendant named in those cases. There was not even an allegation made before the District Court in this case of any defect(s) in service by publication existed in either of those cases. At the time of the Petitioner's motion to

vacate the judgment in this case,[5] the holdings in those rendered the "alter ego" issue *res judicata* as between the Petitioner and the Respondents here.

After extensive briefing and oral argument, on February 11, 1992 the District Court (Hendron, J.) denied the Petitioner's 60(b) motion:

> The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion [in the first appeal] and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so.[6] The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of

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[5] And continuing to date.

[6] The Petitioner neglects to note that the District Court agreed with alternative grounds for rejecting Alamo's arguments which had been advanced by the plaintiffs, which were based upon logical defects and lack of factual support. These are the same arguments Mr. Alamo is now advancing as Petitioner here.

> imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

In the meantime, Mr. Alamo had filed another motion, seeking the turnover of unspecified documents which had been left behind by the Alamo corporations when realty was seized by the United States Marshal for the Western District of Arkansas pursuant to a writ of execution issued in this case. The Petitioner neglects to mention that an identical motion had previously been made to the District Court.

That motion, captioned "Motion for Order to Release Records", was filed on October 19, 1991, ostensibly on behalf of the Foundation and Music Square. The movant(s) sought to have the District Court:

> . . . enter an order directing that either the U.S. Marshalls Office of the individuals, parties,or entities having control of the aforesaid records, to release said records to the defendants, and authorizing defendants and/or their counsel to secure the aforesaid records and documents for the Tony and Susan Alamo Foundation and Music Square Church and to remove them from the Georgia Ridge Crawford County properties. "Motion for Order to Release Records" at 2, Apdx. II at 196 (emphasis added).

This motion was denied by the Court on October 21, 1991, on grounds that the movant(s) had cited no authority for directing those currently in possession of realty seized and sold at execution to turn over unspecified "records" previously abandoned there. Apdx. II at 201. No appeal was taken from the denial of that motion. Nothing further was heard from Alamo concerning the

records in question for another four months, until Alamo filed a virtually identical motion in his own name on February 14, 1992.

In the February 14, 1992 motion Alamo argued the District Court had "missed the point" in deciding the October 19, 1991 motion. "Defendant Alamo's Motion for Determination of Ownership of Records and for Order of Release" (hereinafter referred to as "Alamo's second motion") at 6, Apdx. II at 31. As with the first motion, Alamo still cited no legal authority in support of the motion.

The Millers filed an opposition to Alamo's second motion, on grounds that the issue of his right to enter on the premises then belonging to the Millers and remove documents was *res judicata* as a result of the order on the first motion. "Plaintiffs' Opposition to Defendant's Second Motion for Determination of Ownership of Records and for Order of Release" (hereinafter "Plaintiff's Opposition") at 2-5, Apdx. II at 56- 59. The Millers also maintained that by quitting the premises without taking any action to secure the documents, and by failing to show any interest in the documents for almost two years while the property at which the documents were stored was sold, Alamo had manifested an intention to abandon the documents, and the documents were now theirs to do with as they pleased. *Id.* at 5-7, Apdx. II at 59-61. Finally, the Millers noted that Alamo's professed sudden need for the documents was pretextual, and the true reason he wanted possession of all of the documents was to continue his proven practice of forging and destroying evidence in proceedings to which he or his corporate "alter egos" were parties. *Id.* at 5-7, Apdx. II at 59-61.

The District Court found that the first motion, filed on October 19, 1991, was "filed at Alamo's request." Order of April 24, 1992 at 1, Addendum to Brief of Appellant at 1. The District Court further noted that "Alamo has **once again** failed to cite any legal authority for his request." *Id.* at 2. The second motion was therefore denied.

An appeal of each of the above orders of the District Court was taken, and the two appeals were consolidated. The Eighth Circuit affirmed the District Court in all respects, and this Petition followed.

SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT

Petitioner's argument is that by refusing to "investigate" the facts in this case and decide whether Alamo the individual was a privy with the Alamo Corporations when the corporations appeared in this case, the District Court and the Eighth Circuit failed to "expose" *Miller I* as a "judicial Frankenstein's monster" which conflicts with *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). However, the District Court was not required to reexamine factual or legal issues which were both the law of this case and *res judiciata* as a consequence of the two judgments in Arizona and Arkansas.

Nor was it the responsibility of the Eighth Circuit to "investigate" Alamo's claims that the prior decisions were wrongly decided. The issue presented to the Court of Appeals was whether the District Court had abused its discretion in denying the Petitioner's motion under Rule

60(b), not whether the underlying case was correctly decided. In making that decision, the Eighth Circuit was surely correct in holding that the District Court could properly find that the issue of the identity between Alamo and the corporations was *res judicata*.

The Petitioner here is asking this Honorable Court to undertake a *de novo* review of the facts of this case, in order to find that something about the holding in *Miller I* compelled its reversal in *Miller II*. These facts have, however, been reviewed twice by the District Court, and twice by the United States Court of Appeals, and amply support that actions taken by those courts. The Petitioner's claim was adjudicated in three prior cases, and there is nothing in any prior decision of this Court which would require he be afforded a fourth opportunity to make his case.

ARGUMENT AGAINST ISSUANCE OF THE WRIT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE ISSUE OF THE CORPORATE LITIGANTS' IDENTITY AS SURROGATES FOR TONY ALAMO WAS *RES JUDICIATA*, AND NO FURTHER REVIEW OF THAT QUESTION WAS NECESSARY OR PERMISSIBLE.

A. When the petitioner appeared before the District Court and moved for relief from judgment under F.R.Civ.P. 60(b), the question of his identity with the corporate litigants was *res judiciata*.

Alamo's entire argument that the District Court could not properly follow *Miller I* on the issue of personal

jurisdiction hinges upon his claim that he was "not a party or in privity with a party" to this case when *Miller I* was decided. For this reason he devotes substantial effort to trying to convince each court along the line that he cannot be held to the previous findings in this case that the corporate litigants were in fact Alamo's "alter egos." However, the Petitioner neglects to address the two separate judgments in other cases between these same parties in which it was also held that the Foundation and Music Square are Alamo's "alter egos." Those judgments are each as binding upon Alamo as the judgment in this case, and since neither of those judgments have ever been challenged on any ground, it is not even arguable there is some defect in service of process which relieves Alamo from the judgments in those cases.

As Alamo admitted to the District Court below, the Millers instituted an independent action against the corporate entities *and Alamo* in an Arizona court on November 14, 1990. Apdx. II at 192-93, ¶13. In that action the Arizona Court ultimately adjudged that the Foundation and Music Square were the "alter egos" of Alamo. Alamo conceded that he was served in that action by publication. Apdx. II at 193, ¶14.

The Petitioner never raised any allegation before the District Court or the Court of Appeals that service in either the case in Arizona or the case in Arkansas was defective. Because the parties here are the same parties, and the claim at issue here is the same claim, it is fundamental and inescapable that the issue of Alamo's "alter

ego" relationship to the corporations is *res judicata*. *Nevada v. United States*, 463 U.S. 110, 129, 103 S.Ct. 2906, 2918 (1983) (and cases cited therein); *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990); *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982); *United States v. Euge*, 691 F.2d 379 (8th Cir. 1982). Thus, by the time Alamo made his 60(b) motion to the District Court he was, and he continues to be, precluded as a matter of law from arguing that the corporate litigants were not in privity with him when *Miller I* was decided.

When the Millers pointed this out to the District Court in opposition to Alamo's Rule 60(b) motion, Alamo responded with two arguments. First, he argued that the Arizona judgment, "was premised upon the entry of the default judgment of this Court [in the instant case] which Defendant Alamo claims is void for lack of personal jurisdiction over him." Apdx. II at 193, ¶14. Second, he argued that he had no actual knowledge regarding the Arizona judgment. Apdx. at 193, ¶14. The first contention is belied by the record, and the second is immaterial.

The fact that Alamo questioned personal jurisdiction over him in *this* case has nothing to do with the jurisdiction of the other two courts. Even if we were to assume, *arguendo*, that there was no personal jurisdiction over Alamo in this case, the record in each of the other two cases plainly discloses that in neither of them was personal jurisdiction predicated upon the judgment in this case. At no time did the Millers plead or seek to rely upon any form of collateral estoppel as a basis for any finding of any jurisdictional fact. Although there was

reference to these judgments in each complaint and in each resulting judgment, those references were only to establish the debt which the Millers sought to collect, and the Millers' right to collect it from assets of the ostensible corporations. Apdx. at 592-94, ¶¶7-9; Apdx. at 622-23, ¶¶8-9.

In each case the Petitioner defaulted, and by his default admitted all of the well pled factual allegations pertaining to his "alter ego" relationship with the two corporations in question in this case. The fact that those judgments were entered by default is of no legal significance here. A judgment entered by default has the same preclusive effects as one entered after an appearance and litigation on the merits. *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 707-708 (8th Cir. 1979); *Brown v. Kenron Aluminum and Glass Corporation*, 477 F.2d 526, 531 (8th Cir. 1973). A default judgment operates as *res judicata* and is conclusive as to whatever was essential to support the judgment in the prior case. *Morris v. Jones*, 329 U.S. 545, 500-551 (1946); *Riehle, supra* at 225.

Further, even if it were true these other judgments had been "based upon" the holdings in this case, and further assuming this case would be someday reversed, the Arizona judgment would still not be rendered void. In a case where a judgment is based upon an earlier judgment, reversal or other nullification of the first judgment does *not* automatically nullify the second judgment. *Reed v. Allen*, 286 U.S. 191, 52 S.Ct. 532 (1932); *Deposit Bank v. Frankfort*, 191 U.S. 499, 24 S.Ct. 154 (1903); Restatement of Judgments (2nd) § 16 (1982); *see also*, Restatement of Judgments (1st) § 44. While the Arizona and Arkansas

Chancery judgments would be "voidable" if they were based upon the judgment in this case and the judgment in this case were subsequently reversed, the state court judgments would not be void *ab initio*. Until the successive judgments would be challenged in proper proceedings, they would be valid and binding. Since they are not reversed, those judgments retain their force today, just as they did when Alamo's Rule 60(b) motion was before the District Court.

As for the claim that Alamo did not know about the Arizona suit, even if such were true, Alamo's lack of actual knowledge would not alter the result. The mere fact that one served by publication does not have actual knowledge of the suit does not render service ineffective. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950) (actual notice to missing defendants whose whereabouts are unknown not constitutionally required); *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989). The petitioner's plea that he did not have actual notice of the judgments in the state court cases was therefore immaterial to the *res judicata* issue.

The Petitioner failed to offer the District Court or the Court of Appeals any reason why the District Court's determination that the "alter ego" question was settled would not be correct based upon the state court judgments. Nor does he offer any such explanation to this Court. Since even the Petitioner has been forced to concede that the holding in *Miller I* would bind him "were he substantially (albeit not formally) . . . in privity with a party to that appeal" (Brief of Appellant in *Miller II* at 22), the District Court's decision to follow *Miller I* is fully justified in light of, *inter alia*, the state court judgments.

B. The fact that the status of the corporations as "alter egos" of Mr. Alamo was settled in prior litigation is a primary distinguishing factor between this case and *Zenith Radio Corporation v. Hazeltine Research, Inc.*

The Petitioner argues that the Court of Appeals' decision to affirm the District Court is inconsistent with this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 295 U.S. 100 (1969). This argument fails, however, for two reasons. First, the question whether service of process upon one party is sufficient service of process upon a second litigant was never actually presented in *Zenith Radio*. Second, the purported "alter ego" status of the non-appearing entity in *Zenith Radio* had never been litigated or decided, either by the trial court or by other courts in previous cases, as was the situation in the instant case. *Zenith Radio* is therefore distinguishable on its facts, and there is nothing inconsistent between that case and the holding of the Court of Appeals in this case.

The key fact in *Zenith Radio* is that Zenith Radio (as a counterclaimant) and HRI (the corporation which was actually named as a party on Zenith Radio's counterclaim), had entered into a *stipulation* to the effect that "for purposes of this litigation [HRI and its parent corporation, Hazeltine] will be considered to be one and the same company." *Id.* 295 U.S. at 108-109. It appears the purpose of the stipulation was to facilitate discovery and pleading (*Id.* 295 U.S. at 108, 111 n. 4), and it is clear the District Court did not consider Hazeltine a party to the case (*Id.* 295 U.S. at 110 n. 3).

Nevertheless, the District Court sought to hold Hazeltine liable for the ultimate judgment on the theory that the stipulation was "equivalent to an entry of appearance, or as consent to entry of judgment against it." *Id.* 295 U.S. at 110. This Court reversed, finding that "the stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them." *Id.* 295 U.S. at 110.

Thus, the facts and ultimate holding of the Supreme Court in *Zenith Radio* have nothing to do with jurisdiction based upon an adjudicated finding of "alter ego" status. Hazeltine was not named as a party in Zenith Radio's pleadings, and there was no suggestion in the pleadings or anywhere else in the case that HRI and Hazeltine were "alter egos." *Id.* 295 U.S. at 108. Even when Hazeltine made a post-verdict "special appearance," the issue of Hazeltine's status as an "alter ego" was not raised. *Id.* 295 U.S. at 112 n. 6.

These are critical distinctions. In the instant case, Alamo was named as a party to the litigation, and the complaint expressly alleged he and the corporations were "alter egos." Alamo now admits that he was aware that the case had been filed, and the record plainly shows he was aware of the issues in the case, including the fact that he was accused of operating the corporations as shams. The finding of "alter ego" status, far from being based upon a stipulation, was based upon evidence presented at a two-day trial on the question. It was the evidence presented at the trial which supported the District Court's holding that the corporations were acting merely as "alter egos" for Mr. Alamo.

The importance of this distinction was highlighted by this Court in the *Zenith Radio* opinion:

> **If the *alter ego* issue had been litigated,** and if the trial court had decided that HRI and Hazeltine were one and the same entity and the jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. *Id.* 295 U.S. at 111 (*dictum*, emphasis added).

The fact is that in this case, and in two prior cases, the Petitioner had a full and fair opportunity to litigate the question whether the corporate litigants were actually mere extensions of himself. That issue was determined adversely to the Petitioner, and there is nothing in *Zenith Radio* which would require courts to allow him to litigate the issue again and again.

The instant case actually falls within the rule of those precedents which hold that where one named defendant is served with process, and it is later determined that a second named defendant is in reality nothing more than the "alter ego" of the first, jurisdiction over the second defendant can properly be predicated upon jurisdiction over the first. *See, e.g.: Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc.*, 519 F.2d 634, 637-638 (8th Cir. 1975) (where a corporation is the alter ego of the stockholders, jurisdiction over the corporation will support jurisdiction over the stockholders); *Certified Building Products v. National Labor Relations Board*, 528 F.2d 968 (9th Cir. 1976) (per curiam) (where record supported N.L.R.B.'s finding that corporation was "alter ego" of

individual corporate principal, service upon the corporation was equivalent of service upon the individual); *I.A.M. National Pension Fund v. Wakefield Industries*, 699 F.2d 1254, 1259 (D.C. Cir. 1983) (and authorities cited therein) (service of process upon purported domestic subsidiary of foreign corporation effective as to foreign corporation where corporations were not in truth separate entities); *Minnesota Mining and Mfg. Co. v. ECO Chem., Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985) (service upon predecessor corporation which was "alter ego" of successor, effective on successor company); *Bally Export Corp. v. Balicar Ltd.*, 804 F.2d 398, 401 (7th Cir. 1981), (service upon one corporation which was ultimately found to be the "alter ego" of second corporation was sufficient as to both); *N.L.R.B. v. Denna Artware, Inc.*, 310 F.2d 470 (6th Cir. 1962) (individual owner of "alter ego" corporation deemed served if "alter ego" served). *Zenith Radio, supra,* does not hold to the contrary.

II. SIMILARLY, THE PETITIONER WAS PROPERLY BARRED UNDER THE DOCTRINE OF *RES JUDICATA* FROM ATTEMPTING TO RELITIGATE HIS CLAIM THAT DOCUMENTS ABANDONED BY THE CORPORATIONS IN PREMISES SEIZED IN EXECUTION SHOULD BE TURNED OVER TO HIM, A YEAR AFTER THE PROPERTIES WERE DISPOSED OF.

This appeal, as well as the underlying motion before the District Court, are but two more examples of Alamo's consistent practice of relitigating any claim which is decided adversely to him, in total disregard of the doctrine of *res judicata*. The question of Alamo's right to

retake possession of documents and records which were left on Georgia Ridge in February, 1991, was litigated and decided in October, 1991. If Alamo was unsatisfied with that ruling, his remedy was to take a timely appeal. Instead, he waited four months and filed the same motion again.

In his second motion Alamo did not claim he had any new grounds, either factual or legal, which were not known to him when he first petitioned the District Court. Rather, Alamo sought only to embellish the grounds he asserted the first time around, explaining to the District Court that the U.S. Magistrate Judge simply "missed the point" of his first petition. Apdx. II at 31. Even if such were in fact the case, however, Alamo's remedy was to file a timely appeal, not to wait four months and try again. *Poe v. John Deere Co., supra; United States v. Young,* 806 F.2d 805, 806 (8th Cir. 1986) (Rule 60(b) motion not a substitute for appeal), *citing Hoffman v. Celebrezze,* 405 F.2d 833, 836 (8th Cir. 1969).

It could hardly be more settled that an issue litigated and decided between given parties is *res judicata* between them, and that issue cannot ever be relitigated between those parties or their privies. *E.g., Nevada v. United States, supra,* (and cases cited therein); *Poe v. John Deere Co., supra,* (8th Cir. 1982) (cases cited therein). This bar is complete, and prevents relitigation based upon the grounds actually asserted, as well as any new ground which was not asserted but which could have been. *E.g., Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *Poe, supra* at 1105.

By the time Alamo made his second motion to obtain the corporate records, the question whether Alamo was "in privity" with the corporate entities was long since settled. Even putting aside the fact that the corporations' status as the "alter egos" of Alamo was the law of this case, it was *res judicata* as a consequence of the state court judgments. The October 19, 1991 motion sought exactly the same relief as was sought in the February 18, 1992 motion. The Petitioner was therefore bound by the first ruling of the District Court to the same extent as if it had been brought in his own name.

The Petitioner's second motion addressed to the records he was claiming was therefore properly denied by the District Court on grounds that, among other things, the Petitioner was barred as a matter of law from relitigating his claim. The record before the Court of Appeals amply demonstrated this state of affairs, without need for oral argument or a rehash of Alamo's machinations.

CONCLUSION

The Petitioners' convoluted and sophistical arguments have now been reviewed by two United States District Judges and six judges of the United States Court of Appeals for the Eighth Circuit, none of whom has seen any merit in any of them. Should this Court deem it desirable to review these arguments yet another time, it will be the honor of the undersigned's career to appear and argue the case. But in truth there are many, many cases much more deserving of this Honorable Court's

time and attention. The Respondents therefore respectfully maintain the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel of Record for Respondents.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1447WA
No. 92-2205WA

Robert A. Miller; Kody Miller, by Robert A. Miller; Robert Miller, by Robert A. Miller; Carey Miller; Jeremiah Justin Miller, by Carey Miller; Rick Miller; James Miller,

Appellees,

v.

Tony Alamo, also known as Tony Fernando, also known as Tony Fernando Alamo, also known as Bernie Lazar, also known as Bernie Hoffman, also known as Bernie Lazar Hoffman, also known as Boris Lazar, also known as Papa Tony, individually and as officer & director of Tony & Susan Alamo Foundation & Music Square Church,

Appellant.

Appeals from the United States District Court for the Western District of Arkansas.

[UNPUBLISHED]

Submitted: November 12, 1992

Filed: November 19, 1992

Before FAGG, BEAM, and HANSEN, Circuit Judges.

PER CURIAM.

Tony Alamo appeals adverse rulings of the district court in these combined cases. Having reviewed the record and the parties' briefs, we conclude the issues raised on appeal do not require further consideration. The district court's rulings are clearly correct. We affirm the district court. *See* 8th Cir. R. 47B.

[2] A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION, ET AL. DEFENDANTS

ORDER

On October 21, 1991, Tony Alamo (Alamo) filed a motion to dismiss or set aside the default judgment entered on April 27, 1990, and for return of property sold as a result of that judgment. The afternoon of November 12th, Alamo filed a motion for temporary restraining order (TRO) along with a motion for preliminary injunction. He sought to restrain the U.S. Marshal, the plaintiffs and the buyers of the auctioned property from disposing of, degrading the value of or selling any property obtained as a result of this case until the Court could rule on his motion to set aside and vacate the default judgment. The Court held a telephonic conference the morning of November 14th.

By order filed on November 15th reflecting the rulings announced at the conference, the Court denied the November 12th motion for TRO and noted the parties had stipulated that there would be a merger of the motion for preliminary injunction with a decision on the merits of the motion to set aside. Alamo was directed to file his brief by November 25th on whether the [2] holdings in *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143 (8th Cir. 1991) (*Miller*) that the district court had

personal jurisdiction of Alamo and that the corporate entities were his alter egos are dispositive of his motion with replies to Alamo's brief to be filed by December 2nd. The Court stated that once all the briefs were filed a review of the file would be made to determine if a ruling could be made on the record without additional testimony or argument.

On November 22nd, plaintiffs filed a response to the motion for return of property. They argue that if Alamo is correct in his assertion that the property is his, then he is admitting that the Court was correct in findings that the corporations were acting as his "alter egos." They continue that if Alamo is instead arguing that the corporations are distinct and separate entities from him, then he is not the proper party to demand the property's return.

On November 26th, Alamo filed his brief on the Eighth Circuit decision. He argues that the issues presented by his October 21st motion were not litigated in the Eighth Circuit, that this Court is not prohibited from addressing the merits of a Civil Procedure Rule 60(b) motion after an appeal, that he would be denied due process if the prior judgment is considered binding on him since he was a non-party, that there is no privity between himself and the corporate entities, that the doctrine of res judicata does not apply to a direct attack on the judgment, that the corporate entities lacked standing to raise the issue of whether there was [3] jurisdiction over him, and that even if plaintiffs had complied with Arkansas' provision for service by publication, such rule was constitutionally deficient as applied in this case.

He filed his response on November 27th to Plaintiffs' November 12th objection and motion to strike exhibits that were attached to his October 21st motion. He asserts that the exhibits constitute an offer of proof of what evidence would be presented at an evidentiary hearing.

On November 29th, he filed a reply on the motion for return of property that if the default judgment is set aside, then plaintiffs have no legal right to the property regardless of whether he or the corporate entities own the property. That same date, he filed a supplement to his November 26th brief adding the argument that his liability for the damages awarded to plaintiff was not briefed or considered on appeal.

Plaintiffs filed a combined response to the motion to dismiss/motion to set aside and vacate default judgment and their brief regarding the Eighth Circuit decision. The brief first deals with Alamo's argument that the claims against him should be dismissed since he was not served within 120 days and then discusses the service by the warning order. Besides responding to the points raised by Alamo, plaintiffs discuss the preclusive effects of the prior litigation, his failure to meet the burden of proof, and the issues of waiver and estoppel due to Alamo's affirmative misconduct.

[4] Alamo filed a reply on December 5th attaching transcript portions of the detention hearings held in Alamo's criminal case. That same date, plaintiffs filed an opposition to Alamo's November 29th supplemental brief on both timeliness and substantive grounds.

On December 6th, plaintiffs filed a reply on the motion for return of property. Their surreply on the

motion to vacate was filed on December 12th attacking the admissibility of the exhibits to Alamo's December 5th pleading.

The Court has carefully examined the arguments of Alamo and plaintiffs in the context of the record including the *Miller* opinion and the applicable law. The Court has concluded that neither an evidentiary hearing nor further argument is required. It is not necessary to get bogged down in addressing all the fallacies of Alamo's arguments since plaintiffs have fully done so. The bottom line is that the Eighth Circuit in *Miller* has already decided that the district court had personal jurisdiction over Alamo pursuant to Arkansas Civil Procedure Rule 4(f) and that, in any case, the entry of appearance of the corporate entities, which have been found to be alter egos of Alamo, constituted an entry of appearance by Alamo. Alamo has simply not shown any basis for the Court to ignore and relitigate those factual and legal determinations. He is not entitled to another bite at the apple under the guise of imaginative, post-appeal variations that ultimately still challenge personal jurisdiction.

[5] On December 6th, plaintiffs filed a motion to strike the appearance of the corporate entities through Roy Gean, III. They ask that all parties be relieved from serving anyone purporting to represent Music Square Church, Inc. and/or Tony and Susan Alamo Foundation since those entities have no existence separate from Alamo. In particular, plaintiffs are concerned that the reappearance of Gean in the certificates of service might be used by Alamo as a waiver by plaintiffs or demonstrating inconsistent action by the Court. Attached as an exhibit is Gean's February 25, 1991 letter explaining why

he would no longer be participating in the proceedings. No response to this motion has been filed. Besides the points made in plaintiffs' motion, the Court notes that Gean did not participate in the November 14th telephonic conference. Plaintiffs' arguments and concerns are well taken and the motion to strike the appearance of the previously dismissed corporate defendants will be granted.

Finally, it appears that there is an outstanding motion filed by plaintiffs on August 1st for attorney's fees and costs under the Equal Access to Justice Act (EAJA) against the United States. This motion is referred to U. S. Magistrate Judge Stites for recommended disposition.

Accordingly, Alamo's October 21st motion to dismiss or, in the alternative, to set aside and vacate default judgment and for return of property is denied. As Alamo's motion for preliminary injunction was merged with the merits of the October 21st motion, the November 12th motion for preliminary injunction is denied. [6] Since the exhibits do not affect the Court's ruling, plaintiffs' November 12th motion to strike exhibits is denied. Plaintiffs' December 6th motion to strike the appearance of the previously dismissed corporate defendants is granted. Plaintiffs' August 1st motion for attorney's fees and costs under EAJA against the United States is referred to Magistrate Judge Stites for recommended disposition. Unless the parties notify the Court in writing within 15 days from the file-date of this order of any outstanding motion not addressed by this order, such motion will be deemed moot.

IT IS SO ORDERED this 11 day of February, 1992.

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

U. S. DISTRICT COURT
WESTERN DIST.
ARKANSAS
FILED
FEB 12 1992

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP, on 2-12-92 by MSJ

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, ET AL. PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO
FOUNDATION, ET AL. DEFENDANTS

ORDER

(Filed April 27, 1992)

On February 18th, Alamo filed a motion for determination of ownership and the release of records seized by the U.S. Marshal Service during the execution of the money judgment in favor of the plaintiffs. This motion is supported by exhibits. Plaintiffs responded on February 25th and also moved for imposition of sanctions. Alamo filed a reply to his motion that also responded to the request for sanctions on February 28th. Plaintiffs filed a reply to their sanctions motion on March 5th. Alamo filed a supplemental response on sanctions on March 13th and plaintiffs filed a sur-reply on April 2nd.

On October 17th, a motion for order to release records so they could be used in another case was filed at Alamo's request. After the matter was referred to Magistrate Judge Stites for disposition, the motion was denied by order filed on October 21st on the ground that no legal authority for the unusual request had been presented. Plaintiffs argue that in light of the October [2] 21st decision, Alamo should be assessed sanctions for trying to relitigate this issue.

The records at issue were left on properties that were executed upon in February of 1991 and later sold to plaintiffs at execution sale in this case. Alamo has once again failed to cite any legal authority for his request. The motion for determination of ownership of records and for order of release is denied. However, the Court is persuaded that sanctions are not warranted and so plaintiffs' motion for imposition of sanctions will be denied.

Finally, plaintiffs filed a third petition for allowance of attorney's fees and costs on February 26th. No response to this petition has been filed. This petition is referred to Magistrate Judge Stites for recommended disposition.

Alamo's February 18th motion for determination of ownership of records and for order for release and plaintiffs' February 25th motion for imposition of sanctions are denied. Plaintiffs' February 26th third petition for allowance of attorney's fees and costs is referred to Magistrate Judge Stites for recommended disposition.

IT IS SO ORDERED this 24 day of April, 1992.

This document entered on docket in compliance with Rule 58 and 79(a), FRCP,

on 4-27-92 by MSJ

/s/ George Howard, Jr.
UNITED STATES
DISTRICT JUDGE

Robert A. MILLER; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller, Appellees.

v.

TONY AND SUSAN ALAMO FOUNDATION, Appellant,

t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors;

Music Square Church, Appellant.

t/d/b/a Alamo Mini Mart, Holiness Tabernacle Christian School, Alamo of Nashville in Alma, Alamo Ready Mix, Alamo Discount Grocery, Hartford Advertising, Alamo Freight, Alamo Farms, Alamo Restaurant, Alamo Kerr-McGee Transmission Shop, Alamo DX, & End Times Books; Tony Alamo, a/k/a/ Tony Fernandoi,a/k/a Tony Fernando Alamo, a/k/a/ Bernie Lazar, a/k/a Bernie Hoffman, a/k/a Bernie Lazar Hoffman, a/k/a Boris Lazar, a/k/a Papa Tony, ind. & as officer & dir. of Tony & Susan Alamo Foundation & Music Square church; Marc Lundgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Tommy Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Carol Ann Miller, a/k/a Carol Ann [144] Landgarten, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church; Susan L. Miller a/k/a Susan Scarcello, ind. & managing agent for Tony & Susan Alamo Foundation & Music Square Church.

No. 90-1826.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 10, 1990.

Decided Jan. 23, 1991.

Plaintiffs brought suit against four individuals and two alleged corporate entities, alleging violations of the Fair Labor Standards Act, the Davis-Bacon Act, and the Arkansas minimum wage law. Other counts alleged various common-law torts perpetrated against defendants. The United States District Court for the Western District of Arkansas, Morris Sheppard Arnold, J., ruled that corporate entities were alter egos of individual defendant, and entered personal judgment against individual defendant in the amount of $1,448,549. Corporate entities appealed. The Court of Appeals, Henry Woods, District Judge, sitting by designation, held that: (1) district court did not err in disallowing testimony of defense witnesses; (2) court properly denied motion for recusal; (3) court had personal jurisdiction over defendant under the Arkansas Long Arm Act; and (4) evidence supported finding that alleged corporate entities were alter egos of individual defendant.

Affirmed.

See also 748 F.Supp. 695.

* * *

[145]

* * *

Roy Gean, Fort Smith, Ark., for appellant.

Peter Georgiades, Pittsburgh, Pa., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

HENRY WOODS, District Judge.

The Plaintiffs, Robert A. Miller, et al., filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Foundation and Music Square Church, Inc. answered through joint counsel. None of the individual defendants answered although all were served in accordance with the applicable statute and Federal and State Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

4. Tony Alamo moved corporate assets into and out of the corporations, and between them,

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[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

at will, and without regard to any ownership interest by the corporate entities.

5. Tony Alamo appointed and removed corporate officers at his personal whim.

6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.

7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.

[146] 8. Corporate officers and boards, and the corporate form in general, were ignored by Tony Alamo.

9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia*:

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc., were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
>
> . . . .
>
> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony

> and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) The district court erred in disallowing the testimony of certain defense witnesses; (2) the district judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).

2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).

3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly*, 519 F.Supp. 1029 (D.Mass.1981); *Bradley v. Milliken*, 426 F.Supp. 929 (E.D.Mich.1977); *In Re Bokum Resources Corp.*, 26 B.R. 615

(Bkrtcy.D.N.Mex.1982). Clearly, the [147] matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D.Ark.1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark.R.Civ.P. Rule 4(f) The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order

> issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App.289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4(c)(2)(C)(i) Fed.R.Civ.P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A. § 16-4-101, *Et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(C)(1)(c) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal

or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark.R.Civ.P. which incorporates A.C.A. § 16-4-102(A)(1) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> [148] Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark.Code Ann. § 16-4-102(1) (1987) and ARCP Rule (e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4(f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f) applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least

two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

United States Constitution,
Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

United States Constitution,
Fourteenth Amendment

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

Arkansas Rule of
Civil Procedure 4 (f)

(f) **Service Upon Defendant Whose Identity or Whereabouts is Unknown:** (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors. (2) In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and conspicuously posted for a continuous period

of 30 days at the courthouse or courthouses of the country wherein the action is filed and by mailing by the plaintiff or his attorney of a copy of the complaint and warning order to the defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

Federal Rule of Civil Procedure 55

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

* * *

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor * * * . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment

by default has been entered, my likewise set it aside in accordance with Rule 60(b).

* * *

Federal Rule of Civil Procedure 60(b)(4)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void * * * .

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER, et al., Plaintiffs,	:	C.A. No. 88-2206 (Arnold, J.)
vs.	:	
TONY AND SUSAN ALAMO FOUNDATION, et al., Defendants.	:	

/

ORDER AND JUDGMENT

This matter came before the Court upon a motion by the plaintiffs for entry of a declaratory judgment in accordance with the Court's findings at the close of the evidence in this case on March 7, 1990, and for subsequent dismissal of the corporate defendants as independent parties to this litigation.

The question whether the corporate forms of the corporate defendants in this case should be set aside was determined after a full trial on the merits, held on March 6 and 7, 1990. At the close of the evidence, this Court found that defendants Tony and Susan Alamo Foundation and Music Square Church, Inc. were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation. Accordingly, it is hereby:

ORDERED, ADJUDGED AND DECREED that the corporate forms of defendant Tony and Susan Alamo Foundation (t/d/b/a Southwest Business Management Company; Tony and Susan Alamo Christian Foundation; Holy Alamo Christian Church; Alamo Builders Emporium of Alma, Arkansas; Alamo Candy Company; Alamo Construction Company; Alamo Electric of Alma, Arkansas; Alamo Expert Roofing of Fort Smith, Arkansas; Alamo Land Development Company of Alma, Arkansas; Alamo Plumbing of Alma, Arkansas; Alamo Quarries of Alma, Arkansas; Alamo Packing of Alma Arkansas; Tennessee Country Boy Distributors and TCB Distributors), and defendant Music Square Church, Inc. (t/d/b/a Alamo Mini Mart; Holiness Tabernacle Christian School; Alamo of Nashville in Alma; Alamo Ready Mix; Alamo Discount Grocery; Hartford Advertising; Alamo Freight; Alamo Farms; Alamo Restaurant; Alamo Kerr-McGee Transmission Shop; Alamo DX and End Time Books), are hereby set aside and disregarded. Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony and Susan Alamo Foundation and Music Square Church, Inc. as well. It is

FURTHER ORDERED that defendants Tony and Susan Alamo Foundation and Music Square Church, Inc. are hereby dismissed from this case.

April 19, 1990

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States
District Judge

U.S. District Court
Western Dist. Arkansas

FILED
APR 19 1990

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER et al — PLAINTIFFS

V. — Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION et al — DEFENDANTS

ORDER AND JUDGMENT

NOW on this twenty-seventh day of April, 1990, comes on for consideration the above-styled cause.

IT APPEARING to the court that judgment should be entered for the plaintiffs for the reasons stated in the accompanying memorandum opinion, it is ORDERED that judgment be, and it is hereby, entered for the plaintiffs in the amounts specified:

(1)	Robert Miller	
	– Fair Labor Standards Act	$ 44,858
	– alienation of affection	50,000
	– outrage	100,00
	– punitive damages	50,000
		$244,858
(2)	Carey Miller	
	– Fair Labor Standards Act	$ 44,830
	– abuse of civil process	3,383
	– alienation of affection	50,000
	– outrage	150,000
	– punitive damages	75,000
		$323,213

(3)	Richard Miller	
	– Fair Labor Standards Act	$ 49,816
	– outrage	75,000
	– punitive damages	25,000
		$149,816
(4)	James Miller	
	– Fair Labor Standards Act	$ 44,450
	– outrage	25,000
	– punitive damages	10,000
		$ 79,450
(5)	Kody Miller	
	– Fair Labor Standards Act	$ 12,606
	– outrage, beating	50,000
	– punitive damages, beating	500,000
	– other outrage	25,000
	– other punitive damages	10,000
		$597,606
(6)	Justin Miller	
	– Fair Labor Standards Act	$ 12,606
	– outrage, beating	1,000
	– punitive damages, beating	5,000
	– other outrage	25,000
	– other punitive damages	10,000
		$ 53,606

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES
DISTRICT COURT

U.S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

APR 27 1990

CHRIS R. JOHNSON, Clerk
By
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a), FRCP,

on 4-27-90 by mss

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1826

Robert A. Miller; Kody Miller by Robert A. Miller; Robert Miller by Robert A. Miller; Carey Miller; Jeremiah Justin Miller by Carey Miller; Rick Miller; James Miller; Claudia Greiner; Ave Maria Askey; Nanette Miller; Appellees. v. Tony and Susan Alamo Foundation, Appellant, t/d/b/a Southwest Business Management Co., Tony and Susan Alamo Christian Foundation, Holy Alamo Christian Church, Alamo Builders Emporium of Alma, Ark., Alamo Candy Company, Alamo Construction Company, Alamo Electric of Alma, Ark., Alamo Expert Roofing of Fort Smith, Ark., Alamo Land Development Company of Alma, Ark., Alamo Plumbing of Alma, Ark., Tennessee Country Boy Distributors & TCB Distributors; Music Square Church, Appellant.	Appeal from the United States District Court for the Western District of Arkansas.

t/d/b/a Alamo Mini Mart, Holiness *
Tabernacle Christian School, Alamo *
of Nashville in Alma, Alamo Ready *
Mix, Alamo Discount Grocery, *
Hartford Adversing, Alamo Freight, *
Alamo Farms, Alamo Restaurant, *
Alamo Kerr-McGee Transmission *
Shop, Alamo DX, & End Times *
Books; Tony Alamo, a/k/a Tony *
Fernandoi, a/k/a/ Tony Fernando *
Alamo, a/k/a Bernie Lazar, a/k/a *
Bernie Hoffman, a/k/a Bernie Lazar *
Hoffman, a/k/a Boris Lazar, a/k/a *
Papa Tony, ind. & as officer & dir. *
of Tony & Susan Alamo Foundation *
& Music Square Church; Marc *
Lundgarten, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church; *
Tommy Scarcello, ind. & managing *
agent for Tony & Susan Alamo *
Foundation & Music Square Church; *
Carol Ann Miller, a/k/a Carol Ann *
Landgarten, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church; *
Susan L. Miller a/k/a Susan *
Scarcello, ind. & managing agent *
for Tony & Susan Alamo *
Foundation & Music Square Church. *
*

Submitted: December 10, 1990

Filed: January 23, 1991

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOODS,* District Judge.

WOODS, District Judge.

The plaintiffs, Robert A. Miller, et al, filed this suit in the Western District of Arkansas against Tony Alamo, three other individual associates, and two alleged corporate entities, the Tony and Susan Alamo Foundation (hereafter "Foundation") and Music Square Church, Inc. The first two counts of the complaint were based on the Fair Labor Standards Act, 29 U.S.C. § 206, et seq. and the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. Count III of the complaint was based on the Arkansas minimum wage law, and the remaining counts alleged various common-law torts perpetrated against the plaintiffs. In an amended complaint the plaintiffs alleged diversity of citizenship. It was also alleged that the corporate entities were vehicles through which Tony Alamo perpetrated fraud (App. 8, 24), that the corporations were totally controlled by Tony Alamo and used for his personal benefit, and that this control and domination was so complete that the corporate entities had no independent personality or existence of their own (App. 12, 40).

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Rules of Civil Procedure. Since none of the individuals filed an answer, a default was entered against each of the individual defendants on August 17, 1989. No action has been taken regarding the default, and no appeal has been perfected therefrom. The issues with respect to the independent existence of the Foundation and Music Square Church, Inc., apart from Tony Alamo, were set for trial on March 5, 1990. After a two-day trial to the court, during which nine witnesses appeared for the plaintiffs and none for the defendants, as a result of the imposition of sanctions, the district court[1] made findings from the bench. They may be summarized as follows:

1. There was "abundant evidence" that the corporate defendants enjoyed no existence separate and apart from Tony Alamo.

2. There was no evidence that the Foundation was ever even incorporated, but even if it was, the Foundation was formed solely for the purpose of shielding Mr. Alamo's activities and/or was operating simply as an extension of Mr. Alamo.

3. The corporations were shams, used by Tony Alamo for his own purposes.

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[1] The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas.

> 6. Tony Alamo held out to the public that there was no distinction between himself and the corporations.
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> 7. Corporate books and records were manufactured and destroyed, in a fraudulent manner, solely on the command of Tony Alamo.
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> 9. The corporate defendants were simply extensions, or "alter egos," of Tony Alamo.

The district court entered its order and judgment on April 19, 1990, providing *inter alia*:

> [D]efendants Tony and Susan Alamo Foundation and Music Square Church, Inc. were entities which enjoyed no existence separate and apart from defendant Tony Alamo, and that the corporate forms of these two organizations should be set aside. That being the case, there is nothing further to adjudicate with respect to these corporate defendants, and they should be dismissed as independent parties to this litigation.
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> . . . Any judgment which may in the future be entered in favor of the plaintiffs in this case and against defendant Tony Alamo as an individual will lie against the entities known as the Tony and Susan Alamo Foundation and Music Square Church, Inc. as well.

(App. 191-192). The Foundation and Music Square Church, Inc. appealed from this judgment, raising four points: (1) the district court erred in disallowing the testimony of certain defense witnesses; (2) the district

judge should have recused; (3) the district court did not have personal jurisdiction over Tony Alamo; and (4) the court erred in finding that the Foundation and Music Square Church, Inc. were alter egos of the individual defendant Tony Alamo. We affirm.

I. REJECTION OF TESTIMONY FROM DEFENSE WITNESS

Appellants argue that the district judge abused his discretion in sustaining plaintiff-appellee's motion to exclude the testimony of all eight of the witnesses named in defendants' "Pre-Trial Information Sheet." The bases of appellee's motion were: (1) that the defendants should not be permitted to use witnesses who were first identified two business days before trial; and (2) that those witnesses who had been previously identified by name should be excluded because the defendants had failed to disclose their addresses, despite two prior orders of the court compelling them to do so.

In granting the motion, the court made the following findings:

> 1. The defendants had ignored orders of the Court requiring that they provide the addresses of prospective witnesses. (App. 217-18).
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> 2. The defendants had willfully disobeyed the Court's orders for the purpose of causing delay and confusing the plaintiff's case preparation, and had "committed themselves to a course of obstruction." (App. 223-24).
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> 3. By their conduct in disobeying the Court's orders and attempting to confuse the case, the

defendants had displayed contempt for the Court. (App. 224:1-2).

4. The defendants' transgressions had been repeated, and had consumed too much of the Court's time. (App. 224).

These findings are fully supported by the record, which is replete with instances of evasion, obstruction, and contumacy by the appellants. We find no abuse of discretion in granting appellee's motion.

II. RECUSAL OF THE DISTRICT JUDGE

Two days before the trial, appellants made a "Motion to Disqualify Presiding Judge" because "his prejudice in favor of the plaintiffs precludes the defendants from obtaining a fair and impartial trial." The only evidence presented in support of the motion consisted of two newspaper articles concerning a court proceeding. The motion was denied because it came too late and the two newspaper articles were inaccurate. There are two statutes dealing with judicial recusal – 28 U.S.C. § 455(b)(1) and 28 U.S.C. § 144. Section 455 has been interpreted to require a party to make its motion and facts known at the earliest possible time. *United States v. Kelly*, 519 F.Supp. 1029 (D. Mass. 1981); *Bradley v. Milliken*, 426 F.Supp. 929 (E.D. Mich. 1977); *In Re Bokum Resources Corp.*, 26 B.R. 615 (Bkrtcy., D.N.Mex. 1982). Clearly, the matter was known to the defendants when the newspaper articles, which constituted the entire basis for the defendants' motion, were published, which was in November, 1989. This delay was totally unexplained.

Section 144 requires that an affidavit be filed ten days before the beginning of the term. No affidavit was filed here. The newspaper articles, which were rank hearsay and demonstrably inaccurate, did not constitute a basis for recusal. The district judge properly denied the motion.

III. VALIDITY OF PERSONAL JUDGMENT AGAINST TONY ALAMO

Appellants argue that no personal judgment could be rendered against Tony Alamo. After the default was entered, the district judge took testimony on damages and entered a personal judgment against Tony Alamo in favor of the plaintiffs in the total amount of $1,448,549. *See Miller v. Tony and Susan Alamo Foundation*, 748 F.Supp. 695 (W.D. Ark. 1990). No appeal has been perfected from this judgment. Appellants' attorney does not represent Alamo.

It may be noted in passing that service on Alamo, a fugitive from justice whose whereabouts are unknown, was strictly in accordance with Ark. R. Civ. P. Rule 4(f). The rule reads:

> Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of

> mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tort-feasors.

The affidavit required by this Rule, which recites in great detail the difficulty in locating Alamo and efforts to serve him, was duly filed. (App. 289-306). The summons and complaint were duly mailed. (App. 306-322). The warning order was issued by the Clerk and duly published. Service was properly perfected upon Alamo, according to the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure. Rule 4 (c) (2) (C) (i) Fed. R. Civ. P. permits service to be made "pursuant to the law of the state in which the district court is held."

Once service was properly made, personal jurisdiction was obtained against Alamo under the Uniform Long Arm Act, A.C.A § 16- 4101, *et seq.* (1987). This Act permits personal jurisdiction over one who has "committed a tortious act within the state." A.C.A. § 16-4-101(c)(1)(C) (1987). Here the principal portion of the damages assessed by the district judge resulted from a vicious beating administered by Alamo to two of the child plaintiffs in the presence of a large congregation of his cult followers. Another component of the damage award was the tort of alienation of affections. The Uniform Long Arm Act, after setting forth various methods of obtaining service, states: "This section does not repeal or modify any other law of this state permitting another procedure for service." A.C.A. § 16-4-102(E) (1987). *Horne v. Savers Federal Savings & Loan Association*, 295 Ark. 182, 747 S.W.2d 580 (1988) addressed precisely the issue now before us. In that case jurisdiction was also asserted

under the Uniform Long Arm Act, *supra*. Service was first attempted under Rule 4(e) of the Ark. R. Civ. P. which incorporates A.C.A. § 16-4-102-A(l) (1987). After making every attempt to serve the defendant, just as appellees did in the instant case, the plaintiff in *Horne* was relegated to the provisions of Rule 4(f). The service was upheld along with *in personam* jurisdiction:

> Appellants next challenge the chancellor's decision that appellee's service of process under ARCP Rule 4(f) was legally sufficient to give the Arkansas court in personam jurisdiction over them. Again, the appellants are wrong. . . .
>
> . . . .
>
> Under the circumstances demonstrated here, appellee was denied in its efforts to give appellants actual or personal service provided for out-of-state persons under the methods set forth under Ark. Code Ann. § 16-4-102(1) (1987) and ARCP Rule(e). As a consequence, appellee was relegated to obtain service of process on appellants under Rule 4 (f), which is another effective procedure for service under § 16-4-102, Arkansas's long-arm law. *See* Ark.Code Ann. § 16-4-102(E), (which provides this section does not repeal or modify any other law of this state permitting another procedure for service).

747 S.W.2d at 582-83.

This case is dispositive of appellants' argument that there was no *in personam* jurisdiction over Tony Alamo under A.C.A. §§ 16-4-101 and 102 and Rule 4(f). The Supreme Court of Arkansas specifically rejected the same arguments that appellant has made with regard to the applicability of A.C.A. § 16-58-119, holding that Rule 4(f)

applied and not this particular statute. As also provided in the Uniform Long Arm Act, domicile is a basis for personal jurisdiction. A.C.A. § 16-4-101(B). Such a jurisdictional basis is constitutional. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Undoubtedly Alamo was a domiciliary at the time the cause of action arose.

There is another basis for personal jurisdiction over Alamo. The Foundation and the Music Square Church have appeared in this litigation. These entities were found to be alter egos of Tony Alamo. Thus, the entry of appearance by these entities constituted an entry of appearance by Tony Alamo.

IV. SUFFICIENCY OF EVIDENCE TO ESTABLISH THAT ALAMO WAS AN ALTER EGO OF THE ALLEGED CORPORATIONS

Appellants argue that the evidence was insufficient to establish that the two alleged corporate entities were the alter egos of Tony Alamo. The district court's findings on the issue have been set out, *supra*. Appellants have utterly failed to sustain the burden that these findings were clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Their approach is to attack the credibility of the witnesses as "disgruntled former associates of the corporate defendants." At least two of the witnesses were not associates of Alamo. One was a reporter for the *Los Angeles Times*. At any rate, the credibility of these witnesses was a matter within the province of the district judge. We find that each of the court's findings was sustained by abundant evidence. The testimony of the witnesses stands unrebutted in the record.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERT A. MILLER et al.

PLAINTIFFS

v. Civil No. 88-2206

TONY AND SUSAN ALAMO FOUNDATION et al.

DEFENDANTS

MEMORANDUM OPINION

(Filed Apr. 27, 1990)

In this case, plaintiffs allege numerous causes of action against Tony Alamo and several corporate defendants, including the Tony and Susan Alamo Foundation and Music Square Church, a Tennessee corporation. They assert, first, that defendants violated the federal Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a)(1) and 207(a)(1), because plaintiffs performed work for defendants for which they were not paid. Plaintiffs also claim that defendant Tony Alamo purported to divorce Robert Miller and Carey Miller from their wives and purported thereafter to join their wives in matrimony with other men; they allege, too, that Mr. Alamo engaged in a concerted effort to estrange the Millers' minor children from them by asserting that their fathers were dead, were thieves and embezzlers, and were no longer their fathers. These allegations plaintiffs characterize as alienation of affection. Thirdly, plaintiffs seek to recover on the ground that defendants intentionally inflicted emotional distress on them by systematically subjecting them to "extreme,

outrageous practices." Some of these acts are the same as those plaintiffs previously characterized as alienation of affection. Finally, there is a claim captioned "wrongful use of civil proceedings" in which plaintiffs claim that Mr. Alamo initiated and continued an Ex Parte Application for Modification of Temporary Child Support Order for Change of Custody in California, and did so "without probable cause" or "primarily for a purpose other than . . . securing the proper adjudication of the claim . . . with a malicious motive." It is alleged in connection with this claim that plaintiffs in this action were successful in resisting that suit.

Mr. Alamo having wholly failed to answer or appear, the court caused a default judgment to be entered against him. At a subsequent hearing, the court concluded that the defendant corporations were entirely fictitious entities, having no separate existence from their leader Mr. Alamo, who created them, and treated them, as shells and shams for his own purposes, moving money from one to another and to himself at will, causing false records to be made, personally directing all of the business, and ignoring the boards of directors and the corporate form in general. For these reasons, and for others more specifically stated on the record at the hearing, the court declared that it would ignore the form of the corporate defendants and that any judgment recovered against Mr. Alamo was recoverable against the corporate defendants as well.

Plaintiffs having dismissed their claims against the corporate defendants, and the court having held a hearing on damages, the court will proceed to judgment against Mr. Alamo on each of plaintiffs' claims.

I.

It is familiar law that all well-pleaded allegations in a complaint are admitted by virtue of a defendant's default. In this case, plaintiffs have pleaded the facts necessary to establish a violation of the federal Fair Labor Standards Act and for the recovery of liquidated damages under that act. Since these amounts are sums certain, no proof is necessary to establish damages and the court will allow plaintiffs a recovery in the amounts indicated in the judgment.

II.

With respect to the other claims advanced by plaintiffs, the court is obliged to make a finding concerning damages since those claims are not for sums certain but, instead, for consequential damages. The court has had the advantage of a considerable amount of testimony from the plaintiffs on this issue and will now turn to a discussion of the evidence that bears on it.

The easiest of these damages to calculate are those attributable to plaintiffs' claim for abuse of civil process: Carey Miller testified that he spent $3,383.00 for attorney's fees to fend off this frivolous suit and the court finds no difficulty whatever in awarding these to him.

The court now turns to the most disturbing of the allegations of plaintiffs' complaint. Plaintiffs assert that Tony Alamo put on "public exhibitions of corporal punishment, in the form of paddling upon minor children"; and the proof amply showed that Kody Miller, while

being restrained by four adult men, was struck vigorously 140 times with a large wooden paddle by a grown man. The evidence further showed that this punishment was inflicted in a room filled with adults and children and was not only painful (Kody's buttocks were bleeding) but humiliating in the extreme. One of the adult witnesses, indeed one of the principal participants, was Kody's mother.

One difficulty in the way of recovering for this atrocious act is that plaintiffs have not directly asked for relief on account of an assault and battery, evidently preferring, instead, though this is far from clear from the complaint, to lay this claim as an intentional infliction of emotional distress. (Count V incorporates the paddling assertion by reference and alleges that "all plaintiffs" were subjected "to humiliation and public ridicule"; this count also asserts that "the plaintiffs have "suffered physical . . . injury.") Of course, plaintiffs can recover only for acts which it can fairly be said defendants have admitted by defaulting. Though it is a close question, the court holds that defendants have admitted the public paddling of Kody Miller. It is true, too, that reasonable physical correction is not tortious, *see, e.g., Wise v. Pea Ridge School District*, 855 F.2d 560, 564 (8th Cir. 1988), and *Berry v. Arnold School District*, 199 Ark. 1118, 1124-25 (1940), *see also Ingraham v. Wright*, 430 U.S. 651, 663 (1977), and *Dodd v. State*, 94 Ark. 297, 300-01 (1910), but in the court's view, public corporal punishment of children is a *prima facie* tort which, if it can be justified at all, needs to be defended by way of answer and proof. The court can, moreover, imagine no offense that could justify the

amount of physical force used against Kody Miller in this instance.

The court can conceive of no higher duty incumbent on it than the protection of children from outrageous batteries like the one that the evidence here so plainly reveals. No feeling person could fail to be moved by the testimony in this case or to be revolted by the cold-blooded and calculated manner in which the punishment of Kody Miller was carried out. The court awards him $50,000.00 in compensatory damages for his pain, suffering, and humiliation. Nor, in the court's mind, would it be right to allow defendant to go unpunished for this act. It is true that criminal proceedings have been initiated based on the facts presented here; and it is equally true that punitive damages, though an obviously sufficient case has been shown for their imposition, may nontheless be withheld at the discretion of the factfinder. The court is also aware that punitive damages have been severely criticized because of their capacity for arbitrariness and their unpredictability. But in this case the court has no hesitation in finding that an award of such damages is appropriate. For one thing, Mr. Alamo is a fugitive: He has numerous warrants out for his arrest and the prospects for his apprehension are not clear. It is thus not obvious that he will ever be compelled to account for his offenses in a criminal court. For another thing, it can hardly be maintained that the acts perpetrated here are not ones that a reasonable person would not know would earn him the severest kind of censure.

One other difficulty needs to be faced up to. Under current law, a defendant's net worth is a relevant datum

in determining an appropriate amount of punitive damages. This manner of looking at things can be and has been intelligently criticized, but there is no question that it is the prevailing law. In this case, the court has had not a little difficulty in determining the net worth of the defendant, but mainly because of his recalcitrance and utter unwillingness to recognize the authority of this court or, indeed, of any other. There was testimony that he boasted of being extraordinarily wealthy, with a net worth in the tens of millions. This may well have been bluster, but it is abundantly plain that not long ago he enjoyed a cash flow of thousands of dollars a day. When the defendant is a wilful fugitive, when it has been shown that he flagrantly defies the law by the fabrication and forgery of financial records, and when the answers to the relevant questions are peculiarly within his knowledge, the court is justified in presuming the worst against him. The court therefore awards punitive damages to Kody Miller in the amount of $500,000.00.

Kody Miller also asks to recover for past and future psychiatric and counseling expenses. The court sees a difficulty in the way of awarding these damages that seems to it unsurmountable. There might be no difficulty in concluding that Kody could benefit from psychiatric help on account of what manifestly must have been a harrowing experience. But one of his very able counsellors testified that Kody's experience at the Alamo Foundation had made it very difficult for him to adjust to a new life in California. For instance, she said, he had embarrassed himself and earned the scorn of his schoolmates because he had openly criticized Martin Luther King in class. What this suggests to the court is that the

damages sought here are for what might be called deprogramming. The court does not think that it would be proper to award money to Kody on account of any discomfiture experienced by him on account of ideological nonconformity. Courts cannot compel parents and churches to contribute to the inculcation of religious or political beliefs with which they do not sympathize. Religious and political beliefs, no matter how bizarre and nonconforming, are personal matters and the courts are not instruments of orthodoxy charged with the responsibility of keeping citizens on the ideological straight and narrow. The court therefore declines to award damages of this character.

III.

Plaintiffs here, as already noted, also asserted that defendants have committed acts that amount to an alienation of affection. Specifically, they have averred that Mr. Alamo purported to divorce Robert Miller and Carey Miller from their wives by means of a so-called get, a biblical bill of divorcement, and later purported to marry these women to other men. Plaintiffs Robert and Carey Miller also claim that Mr. Alamo alienated their children from them by telling the children that their fathers were dead, that they were thieves and embezzlers, and that they were no longer legally their fathers; Mr. Alamo also, according to plaintiffs, hid the children so that plaintiffs could not find them.

The second of these asserted claims can be shortly dealt with: Arkansas does not recognize as tortious the alienation of one's children's affection. *See Orlando v.*

Alamo, 646 F.2d 1288, 1289-90 (8th Cir. 1981). Though Mr. Alamo has admitted the acts complained of by his default, the court still has a duty to determine whether those acts are actionable. As they are not, the court dismisses this claim. As for the claim of alienation of the wives' affection, the Arkansas legislature, by virtue of Act 46 of the 1989 session, specifically provided that the "actions of alienation of affection and criminal conversation are abolished," but a savings clause provides that the act does not apply to "litigation pending before the effective date of this act." The effective date of the act was November 14, 1989; this action was filed more than a year previous. Therefore the act is of no effect on this litigation.

An issue that arises in the special context of this case, however, must still be addressed, and that is whether Mr. Alamo's actions are not protected by the First Amendment guarantee of freedom of religion. The question is not whether he may constitutionally be denied the actual power to divorce a man from his wife; the court entertains no doubt that he may. The question is rather a more subtle one, namely, whether Mr. Alamo may constitutionally be deprived of the right to persuade a woman, for religious reasons, to leave her husband and take up with another man. This question might have been attended by the largest difficulties, but the court sees no necessity of addressing it directly because the complaint alleges that Alamo committed these acts "to further his scheme . . . and to cause further injury to the plaintiffs." Fairly construed, these allegations excluded a genuine

religious purpose from the list of possible motives entertained by Mr. Alamo and the court therefore holds these facts actionable.

The matter of damages presents a real difficulty. Though plaintiffs testified that they had previously had good marriages, it is not very easy to put a number on a tort of this sort. The Supreme Court of Arkansas has frequently been urged to set aside verdicts in cases of this sort because they were excessive, but it has never done so. *See, e.g., HVASTA v. McGough,* 276 Ark. 168, 633 S.W.2d 31 (1982); *Hammond v. Peden,* 224 Ark. 1053, 278 S.W.2d 96 (1955); *Alexander v. Johnson,* 182 Ark. 270, 31 S.W.2d 304 (1930); *Weber v. Weber,* 113 Ark. 471, 169 S.W. 318 (1914). In *Hardy v. Raines,* 228 Ark. 648, 310 S.W.2d 494 (1958), the court sustained an award of $65,000.00. The court will award plaintiffs Robert and Carey Miller $50,000.00 each on this claim but declines to award punitive damages.

Another of plaintiffs' claims can be briefly dealt with. Young Justin Miller was also publicly punished but his paddling was not as severe as Kody's: He received ten swats. The court nevertheless believes that the public nature of this punishment makes it actionable and will award Justin Miller $1,000.00 in actual damages and $5,000.00 in punitive damages. There was testimony at the trial that at least part of the motive for Justin's paddling was to deter him from telling the authorities about the beatings being administered at Mr. Alamo's direction. The children had been admonished to refer to the punishments meted out as "spankings." Had these facts been pleaded the court would have awarded punitive damages in a much larger amount, for in that event the motive

would have been admitted by the defendants. But on the present record it feels unable to make a larger award.

IV.

Finally, plaintiffs allege numerous other acts which they characterize in Count V of their complaint as the intentional infliction of emotional injury. Among these acts were causing business documents to be executed under physical duress, publishing defamatory statements, slandering plaintiffs to their spouses, filing false criminal charges, breaking and entering plaintiffs' houses, hiding their children and spouses, and subjecting plaintiffs to humiliation and public ridicule. Included in these allegations also was the assertion that Mr. Alamo subjected the plaintiffs to a regimen including no time for sleep coupled "with an extremely poor diet and bizarre fasts" which left plaintiffs "confused, demoralized and unable to clearly think or reason," all this with a design to undermine and eventually to destroy "plaintiffs' self-respect, self-esteem and that concept of self and self-worth known by mental health professionals as 'ego.' " This harrowing list of abuses the defendant has chosen to admit by his default.

There can be no doubt that these acts are all actionable. The court again must face the difficulty of finding a number to compensate for this monstrous scheme of premeditated psychological injury. Because Carey Miller was subjected to the worst of these abuses, his recovery should be the highest. The court has consulted its trial

notes to determine appropriate damages for each individual defendant, and awards them in the amounts indicated in the judgment.

V.

A judgment consistent with this opinion will issue.

April 27, 1990
Date

/s/ M. S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES
DISTRICT JUDGE

JOHN D. LEWIS, P.C.
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Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

ROBERT A. MILLER, CAREY MILLER, RICHARD MILLER, JAMES MILLER, KODY MILLER and JUSTIN MILLER, Plaintiffs, vs. TONY ALAMO a/k/a BERNIE L. HOFFMAN, BERNIE LAZAR; BERNIE LaZAR; BERNIE LAZAR HOFFMAN; PAPA TONY; BERNIE HOFFMAN; ANTHONY ALAMO, JR.; BERNIE LaZAR HOFFMAN; TONY FERNANDO; TONY FERNANDO ALAMO; t/d/b/a/ MUSIC SQUARE CHURCH, INC; MUSIC SQUARE CHURCH; ALAMO MINI MART; HOLINESS TABERNACLE CHRISTIAN SCHOOL; ALAMO OF NASHVILLE IN ALMA; ALAMO READY MIX; ALAMO DESIGNS, INC.; ALAMO DESIGNS, INC.; ALAMO DESIGNS; ARTISTRY IN GLITZ; ALAMO DISCOUNT	No. CV 90-15200 DEFAULT JUDGMENT (Filed Nov. 14, 1990)

GROCERY; HARTFORD ADVERTISING; END TIME BOOKS; ALAMO RESTAURANT; ALAMO DX; and ALAMO-KERR-McGEE TRANSMISSION SHOP; TONY AND SUSAN ALAMO FOUNDATION; TONY AND SUSAN ALAMO CHRISTIAN FOUNDATION; HOLY ALAMO CHRISTIAN CHURCH; HOLINESS TABERNACLE CHURCH; SOUTHWEST BUSINESS MANAGEMENT COMPANY; ALAMO BUILDERS EMPORIUM OF ALMA, ARK.; ALAMO CANDY COMPANY; ALAMO CONSTRUCTION COMPANY; ALAMO ELECTRIC OF ALMA, ARK.; ALAMO EXPERT ROOFING OF FORT SMITH, ARK.; ALAMO LAND DEVELOPMENT COMPANY OF ALMA, ARK.; ALAMO PLUMBING OF ALMA, ARK.; ALAMO QUARRIES OF ALMA, ARK.; ALAMO PACKING OF ALMA, ARK.; TENNESSEE COUNTRY BOY DISTRIBUTORS; and TCB DISTRIBUTORS;

MUSIC SQUARE CHURCH, INC.,

THE TONY AND SUSAN ALAMO FOUNDATION, INC.

TWENTIETH CENTURY HOLINESS TABERNACLE CHURCH, INC.

JOHN DOES I THRU V

JANE DOES I THRU V

Defendants.

THIS MATTER, coming on to be heard by the Court the date last set forth herein; the plaintiffs appearing by and through their attorney, John D. Lewis, and the following defendants having been served by personal service out of state, to-wit: The Tony and Susan Alamo Foundation, Inc. and Music Square Church, Inc., and the following defendant having been served out of state by Registered Mail, Twentieth Century Holiness Tabernacle Church, Inc., and the remaining defendants having been served by publication, and the defendants having failed to answer or defend; the default of the defendants having been duly entered according to law;

The Court finding that the allegations of plaintiffs' Complaint are true,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs have Judgment against the defendants, and each of them, as follows:

1. That the Deed attached to the Complaint as Exhibit F and attached hereto as Exhibit A wherein Music Square Church, Inc. is the grantor, and Twentieth Century Holiness Tabernacle Church is the grantee is a fraudulent conveyance and is null and void and of no force and effect.

2. That the Judgment of the United States District Court attached hereto as Exhibit B dated April 27, 1990, is hereby declared a lien upon the real property described as follows, superior to any interest of the defendants in said property:

> Lot 11, ZELLA VISTA, a subdivision recorded in the office of the Maricopa County Recorder in Book 30 of Maps, Page 40.

3. The defendants are hereby enjoined from transferring, encumbering or in any manner disposing of the real property described herein.

4. That the conveyance and transfers to Twentieth Century Holiness Tabernacle Church, Inc. from other defendants, as well as any other conveyances for less than fair consideration, or in fraud of creditors, are hereby decreed to be null and void as to the plaintiffs.

5. That the property described herein may be sold as provided by law to satisfy this Judgment which incorporates the Judgment set forth herein as Exhibit B and all costs and attorney's fees awarded by the Court, and that the proceeds of such sale be applied to the cost of these proceedings, the proceedings in Federal Court represented by the Judgment in Exhibit B, and any other Judgment of the plaintiffs.

6. A Writ issue on the filing of this Complaint attaching the assets of each defendant.

7. That John D. Lewis, Esq. is hereby appointed Receiver to hold and manage the property of the defendants, including the property described herein.

8. That the corporate form Twentieth Century Holiness Tabernacle Church, Inc. and Tony Alamo and the other defendants set forth herein are declared to be one and the same, and all of said defendants are merely aliases and the alter-ego of said Tony Alamo, and any Judgments which lie against the said Tony Alamo lie against said defendants.

9. That the plaintiffs are awarded their costs incurred and accruing costs.

DONE IN OPEN COURT this 14th day of November, 1990.

/s/ Robert P. Murphy
COURT COMMISSIONER
ROBERT P. MURPHY

IN THE CHANCERY COURT OF
CRAWFORD COUNTY, ARKANSAS

ROBERT A. MILLER, ET. AL — PLAINTIFFS

VS. — NO: E-90-284 (I)

TONY AND SUSAN ALAMO
FOUNDATION, ET. AL. — DEFENDANTS

ORDER AND JUDGMENT

(Filed Mar. 6, 1991)

This matter came before the court upon a motion by the plaintiffs to strike the answers of two of the defendants, the Tony and Susan Alamo Foundation (a California corporation) and Music Square Church, Inc. (a corporation organized under the laws of the State of Tennessee) and the Plaintiffs Motion for Entry of Judgment. The Court has considered the plaintiffs' motion and the material presented in support thereof, and finds as follows:

1. The plaintiffs filed this action on May 11, 1990, naming four defendants. These defendants are enumerated in the Complaint, and are also identified by various aliases and fictitious names. The named defendants are Tony Alamo, individually, the Tony and Susan Alamo Foundation (hereinafter referred to as "Foundation"), Music Square Church, Inc. (hereinafter referred to as "Music Square"), and Twentieth Century Holiness Tabernacle Church, Inc., a corporation organized under the laws of the State of Arkansas (hereinafter referred to as "Twentieth Century").

2. The gravemen of the plaintiffs' Complaint is that certain real property located in Crawford County, Arkansas was fraudulently conveyed by Tony Alamo to the Foundation, and then to Music Square, and finally to Twentieth Century. The plaintiffs allege that each of the corporate entities was merely an "alter-ego" of Tony Alamo, and that there should be no legal distinction between any of the corporations and Mr. Alamo.

3. The plaintiffs in this action had previously brought suit against Tony Alamo, the Foundation and Music Square in the United States District Court for the Western District of Arkansas. *See: Robert A. Miller, et al. v. Tony and Susan Alamo Foundation, et al.*, C.A. No. 88-2206 (W.D.Ark). After a two-day trial in March, 1990, the U.S. District Court for the Western District of Arkansas found that the Foundation and Music Square were, in fact, vehicles through which Tony Alamo perpetrated fraud, and that they were nothing more than the "alter-egos" of Mr. Alamo. The District Court then entered a declaratory judgment, setting aside the corporate forms of these two corporations, and declaring that any judgment which the plaintiffs might obtain against Mr. Alamo would lie against these corporate forms as well.

4. The plaintiffs subsequently obtained a money judgment in their favor, and against Tony Alamo, in the amount of $1,448,549.00, plus interest, costs and attorneys' fees. *See*: *Miller v. Alamo, supra* (judgment entered April 27, 1990, modified September 6, 1990).

5. The instant action has arisen as a result of the plaintiffs' efforts to enforce the April 27, 1990 judgment against Tony Alamo by levy upon real property located in

Crawford County, Arkansas, and allegedly owned by Tony Alamo. Although the subject property is currently titled to Twentieth Century, the plaintiffs have alleged that the property was previously transferred from Tony Alamo to the Foundation, then from the Foundation to Music Square, and finally, from Music Square to Twentieth Century, all as part of an ongoing effort by Tony Alamo to defraud creditors and hinder and delay their efforts to collect various amounts owed by Mr. Alamo. The plaintiffs specifically alleged that the transfer from Music Square to Twentieth century occurred during the pendency of the litigation in *Miller v. Alamo, supra,* for the specific purpose of preventing the plaintiffs from collecting any judgment they might obtain in that case.

6. As part of the relief the plaintiffs have requested in the instant case, the plaintiffs have asked that this Court declare Twentieth Century to be nothing more than another of the sham corporations erected by Mr. Alamo for the purpose of defrauding creditors, and that Twentieth Century is still one more "alter-ego" of Mr. Alamo.

7. Service of process in this case was effected with respect to Tony Alamo constructively, pursuant to Rule 4(f) of the Arkansas Rules of Civil Procedure. Mr. Alamo has failed to appear or defend this action. Consequently, on October 2, 1990, this Court entered an Order of Default Judgment against Tony Alamo.

8. The plaintiffs served process in this case upon Twentieth Century by actual service. Twentieth Century also failed to appear or otherwise defend this action. Consequently, on August 31, 1990, this Court entered an Order of Default Judgment against Twentieth Century.

9. The Foundation and Music Square however, appeared by counsel, and filed an answer on or about June 11, 1990. The plaintiffs, however, maintain that neither the Foundation nor Music Square has the capacity to appear and answer in its own right, since they have previously been declared to be sham corporations which are not entitled to recognition as legal "persons." In addition, the plaintiffs maintain that neither the Foundation nor music Square would have standing to contest the instant action, since the only relief the plaintiffs are seeking is the re-conveyance of property from Twentieth Century (an entity in default) back to Tony Alamo. As such, neither corporate entity would suffer any injury in fact, regardless of the outcome of this case.

Discussion

On the record now before the Court, it is plain that both Music Square Church, Inc. and the Tony and Susan Alamo Foundation lack the capacity to appear as parties to this action. Each of them has been stripped of its legal capacity to act as an independent person as a consequence of the declaration of the U.S. District Court for the Western District of Arkansas, as set forth in its April 19, 1990 judgment in *Miller v. Alamo*. That was a contested proceeding, in which each of these two corporations appeared, by counsel, and had a full and fair opportunity to litigate the question of their entitlement to recognition as legal entities separate and apart from Tony Alamo. That decision having been decided adversely to them, the issue of their legal existence is *res judicata*.

In addition, even if Music Square Church, Inc. and the Tony and Susan Alamo Foundation were legal cognizable entities, they are not the real parties in interest in this case. The sole relief the plaintiffs are seeking is to have the real property in question conveyed back from the Twentieth Century Holiness Tabernacle Church, Inc. to Tony Alamo or his already judicially declared alter-egos. Neither of the corporate defendants who have filed answers in this case stand to suffer any injury whatsoever should the plaintiff's motion be granted, since they do not claim any right to, or interest in, the real estate in question.

Rather than protecting their own, legitimate interests, it is apparent to the Court that these two corporate entitles, previously having been found to be nothing more than the tools and an extension of Tony Alamo, have appeared in this case as surrogates for Mr. Alamo. It is the law of this state that litigation must be carried only in the name of the "real party in interest." Ark.R.Civ.P. 17. Moreover, for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts of this and any state. *See: Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498 (1970). It would violate that policy to permit Mr. Alamo to remain a fugitive from justice and still appear in this case and defend through surrogate entities.

For all of these reasons, the Court finds that the plaintiffs' Motion to Strike the Answers of Music Square Church, Inc. and the Tony and Susan Alamo Foundation is well taken, and will be granted.

Since the only other parties to this action, Tony Alamo and Twentieth Century, have defaulted, it appears the plaintiffs are now entitled to judgment. Twentieth Century, the current title holder, has admitted the allegations of the plaintiffs' Complaint to be true by virtue of its default. These admissions establish as fact both that the conveyance by form of "Corporate Deed" from Music Square Church, Inc. to Twentieth Century Holiness Tabernacle Church, Inc. on July 25, 1989 (filed in the Clerk's Office on July 26, 1990) which described fifteen properties was a fraudulent conveyance and that Twentieth Century is nothing more than an "alter-ego" of Tony Alamo. These facts being established, it remains to determine what relief can be granted the plaintiffs.

Plaintiffs have met and established by virtue of the facts plead and the prior judicial determinations all of the elements of the Arkansas Fraudulent Transfer Act of 1987. Ark. Stat. Ann. Sec. 4-59-201 *et. sec.*. Pursuant to the Act, the Court finds that Alamo, the Foundation and Music Square violated the act by virtue of intending to fraudulently transfer their property to Twentieth Century in order to hinder, delay or defraud the Plaintiffs.

Further pursuant to the Act Section 204, defendants Alamo, Foundation and Music Square have not received a reasonably equivalent value in exchange for the property.

The Act also provides for a variety of remedies which are available to the Court for violation of its provisions. Section 207(a). These include: (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (2) an attachment or other provisional remedy against the asset transferred or other property of

the transferee; (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure, enjoin further disposition by the debtors or transferee, or both, of the asset transferred or other property, appoint a receiver to take charge of the asset transferred or any other property of the transferee, and/or any other relief the circumstances may require.

Further pursuant to the Act, where as here, a creditor has obtained a judgment on a claim against the debtor, the court may levy execution on the asset transferred or its proceeds. Ark. Stat. Rev. Section 4-59-207(b).

Arkansas Rule of Civil Procedure Rule 70 grants this Court the authority to enter an Executory Order to act directly to secure the necessary result which this Court must require. *McDermott v. McAdams*, 272 Ark. 20, 616 S.W.2d 476 (1981).

Also where, as here, a corporation organized under the laws of this state is functioning as a vehicle through which to perpetrate fraud, and operating as the "alter-ego" of an individual, this Court has the power to set aside that corporate form. It appearing to the Court that Twentieth Century Holiness Tabernacle Church, Inc. is such a sham corporation, and that it is functioning as the "alter-ego" of Mr. Tony Alamo, he Court will declare the corporate form of Twentieth Century Holiness Tabernacle Church, Inc. to be invalid and set it aside.

The Court also has the ability under the Act to take action to ensure that its orders are enforced. This is especially necessary were, as here, Tony Alamo and his various aliases and entities have shown flagrant disregard for the process of law and of this and other Courts.

This is especially true where, as here, Mr. Tony Alamo is a fugitive from Justice and there are not parties capable of making the requisite property transfers which the Court deems appropriate.

In order to ensure that Plaintiffs are actually granted that to which they are entitled from Mr. Alamo and his entities, the Court deems it appropriate to take protective action. Accordingly, the Court will declare the conveyances described in the Complaint to be fraudulent, will set those conveyances aside, and vest title in the pre-conveyance owner, Music Square. Further, the Court will direct the Clerk of the Court to enter this Order into the property records of Crawford County, Arkansas, to serve as notice to the world that this action has been taken. The Court also will enjoin Mr. Alamo, his entities and aliases from transferring or otherwise disposing of any real or personal property or assets until all sums to which Plaintiffs are entitled have been satisfied.

Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

1. The answers of Music Square Church, Inc. and the Tony and Susan Alamo Foundation filed in this action re hereby stricken, and they are dismissed as parties to this litigation.

2. The corporate form of Twentieth Century Holiness Tabernacle Church, Inc., organized as a corporation under the laws of the State of Arkansas, is hereby set aside, and all assets and liabilities of that entity are declared to be those of Mr. Tony Alamo individually.

3. The "Corporate Deed" dated July 25, 1989, recorded in the Office of the Crawford County Circuit and Chancery Clerk at Record Book 89-16, Page 206, is declared to be fraudulent, null and void.

4. The judgment of the plaintiffs in this action, obtained by them in *Robert A. Miller, et al. v. The Tony and Susan Alamo Foundation, et al.*, Civil Action No. 88-2206 on April 27, 1990 as amended, is declared to be a lien upon the property described in the aforementioned deed dated July 25, 1989, recorded in the Office of the Crawford County Circuit and Chancery Clerk at Record Book 89-16, Page 206, as well as a lien upon all other property located in Crawford County, Arkansas, real and personal, which belongs to or is titled in the name of Tony Alamo, the Tony and Susan Alamo Foundation, Music Square Church, Inc. and/or Twentieth Century Holiness Tabernacle Church, Inc.

5. Tony Alamo, and all those purporting to act as an agent or employee of Tony Alamo, the Tony and Susan Alamo Foundation, Music Square Church, Inc. and/or Twentieth Century Holiness Tabernacle Church, Inc., are hereby enjoined from transferring or conveying any real or personal property located in Crawford County Arkansas to any third party, until such time as the judgment of the plaintiffs in *Robert A. Miller, et al. v. the Tony and Susan Alamo Foundation, et al.*, Civil Action No. 88-2206 (including any interest, costs or attorney's fees due in connection with that judgment) is fully satisfied.

6. The Chancery Clerk is hereby directed to enter this Order and Judgment within the Record Books of

Crawford County, Arkansas, in such a manner as to give notice of the contents of this Order to all who look there.

7. The Clerk of this Court shall cause a certified copy of this Order and Judgment to be sent to the Office of the Secretary of State of Arkansas so that it may be noted upon the Articles of Incorporation, Charter and any other appropriate official records of Twentieth Century Holiness Tabernacle Church, Inc., so that any appropriate action be taken by the Secretary of State.

8. This Court retains jurisdiction over this matter for the purpose of entertaining petitions by the plaintiffs for such additional orders or relief as may be necessary to effectuate the provisions of this judgment.

Dated: 4 February 1991

/s/ Warren O. Kimbrough
Chancery Judge

MOTION FILED
MAR 8 1993

No. 92-1306

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER BY ROBERT A. MILLER; ROBERT MILLER BY ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER BY CAREY MILLER; RICH MILLER; AND JAMES MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF SUSAN GROULX, WILLIAM B. SAUNDERS, WILLIAM K. PARRISH, GERARD DEMOULIN, WILLIAM CURRY, DOROTHY CURRY, JOSEPH ORLANDO, LENORE ORLANDO, AL REID, JOHN KOLBEK, TOM BARNETT, AND MARYANNE BARNETT

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MOTION OF SUSAN GROULX, WILLIAM B. SAUNDERS, WILLIAM K. PARRISH, GERARD DEMOULIN, WILLIAM CURRY, DOROTHY CURRY, JOSEPH ORLANDO, LENORE ORLANDO, AL REID, JOHN KOLBEK, TOM BARNETT, AND MARYANNE BARNETT FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Susan Groulx, William B. Saunders, William K. Parrish, Gerard Demoulin, William Curry, Dorothy Curry, Joseph Orlando, Lenore Orlando, Al Reid, John Kolbek, Tom Barnett, and Maryanne Barnett respectfully move for leave to file the attached brief *amicus curiae* in support of the Petitioner, Tony Alamo.

The movants are associates of the Alamo Christian Church. They are representatives of the hundreds of people who have been directly affected by the decisions entered below. This Court, in the case of *Tony and Susan Alamo Foundation, et al.* v. *Secretary of Labor,* 471 U.S. 290 (1985) has described the associates as follows:

> The Tony and Susan Alamo Foundation is a nonprofit religious organization. . . . Among its primary purposes, as stated in its Articles of Incorporation, are to "establish, conduct, and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity." [footnote omitted] The Foundation does not solicit contributions from the public. It derives income largely from the operation of a number of commercial businesses

> [all of which at this writing have been closed and are no longer in operation][1]. . . . *The businesses are staffed largely by the Foundation's "associates, most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits. Tony and Susan Alamo Foundation, et al.* v. *Secretary of Labor,* 471 U.S. 290, 292 (1985) (emphasis added)

The effect of the decisions entered below have been devastating to these associates. As a result of the judgments entered below and the ruthless execution efforts of the Respondents, the associates have lost their homes, their vehicles, and a majority of their personal property some of which had been accumulated over the past twenty years. They have literally had money taken from their pockets as a result of the collection efforts of the Respondents in executing the Judgment entered below. These displaced individuals and their children have been required to live in the streets, in cars, and, for some of the lucky ones, in run-down motels. Moreover, they have been forced to go for extended periods of time with little or no food.

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[1] As noted in *Tony and Susan Alamo Foundation, et al.* v. *Raymond J. Donovan, Secretary of Labor,* 567 F. Supp 556, 562, (1982) "[A]ssociates work for "outside employers" at various times and turn their paychecks over to the Foundation. Others contract for various jobs, such as construction work, and turn the contract proceeds over to the Foundation."

It is felt by the movants that the courts below have neglected to consider the fact that the injustices inflicted upon the Petitioner, Tony Alamo, have also affected hundreds of people such as the associates and their children.

The movants contend that there are serious questions of impartiality on the part of the lower courts, which only this Court can review and relieve. It is the intent of the movants to bring to this Court's attention important facts concerning the context in which this case has been decided below, which facts do not appear in Tony Alamo's Petition for Writ of Certiorari.

Petitioner has consented to the filing of this brief *amicus curiae*. Respondents have not granted consent.

Dated: March 8, 1993.

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus* is set forth in the motion for leave to file attached hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

The movants submit that the District Court and the Court of Appeals erred in denying the Petitioner's Motion based upon Rule 60(b)(4) of the Federal Rules of Civil Procedure, and that the judgment entered below should be reversed.

ARGUMENT IN SUPPORT OF PETITIONER

This Court should grant Tony Alamo's Petition for Writ of Certiorari, because the treatment he received from the Court of Appeals in the *Miller II*[2] appeal fell so far below the minimum standards of due process of law as to condemn *Miller II* as a travesty of justice that no American should be forced to suffer and that this Court should be unwilling to tolerate.

The constitutional issues Tony Alamo raised in his Federal Rule of Civil Procedure 60(b)(4) motion in the District Court and on appeal in *Miller II* were:

---

[2] As in the Petition for a Writ of Certiorari references herein are made to the unpublished opinion of the Court of Appeal for the Eighth Circuit filed November 19, 1992, as "Miller II" and to the earlier opinion of the Court of Appeals reported at 924 F.2d 143 (8th Cir. 1991) as "Miller I."

(a) whether the District Court obtained personal jurisdiction over him in the original action simply because it had jurisdiction over his alleged *alter-ego* corporations;

(b) whether the Court of Appeals in *Miller I* could impose upon him an unheard-of *"non-default default judgment"* (as the petitioner, Tony Alamo, describes it), even though the Court of Appeals held that he *had* appeared in the District Court through the *alter-ego* corporations;

(c) whether on an appeal by the supposed *alter-ego* corporations, Tony Alamo may be held to have been properly served by publication, when he personally participated in neither the District Court proceedings that led to the finding of *alter-ego* status nor the appeal;

(d) whether a default judgment could be imposed upon Tony Alamo when the supposed *alter-ego* corporations, which had timely responded to the Complaint, were excluded from the hearing on damages and whether such imposition would be a denial of due process; and

(e) whether the Millers had engaged in a sufficiently "diligent inquiry" into Tony Alamo's whereabouts to justify service of process on him by publication, as the basis for entry of the default judgment.

These issues are unequivocally significant and difficult. Frivolity is as far removed from these questions as justice is from the decisions entered below.

The District Court avoided coming to grips with these issues on the Rule 60(b)(4) motion by merely relying on the supposed "authority" of *Miller I*. As Alamo explains in his petition. *Miller I* did not decide any of

these issues against him. For example, the "non-default default judgment" was the surprise consequence of the erroneous conclusion in *Miller I* that Tony Alamo had appeared in the District Court in the original action through the *alter-ego* corporations. *Miller I* simply announced that Tony Alamo had so appeared, without further consideration of how, constitutionally, to reconcile the alleged *actual appearance* with the *default* judgment the District Court had entered against him. Similarly, *Miller II* avoided grappling with the issues in two ways: first, by refusing to hold an oral argument; and second, by affirming the District Court in an essentially one-line, unpublished *per curiam* opinion in which the Court of Appeals refused even to state the issues, let alone to show why Tony Alamo's position lacked merit.

The Court of Appeal's *modus operandi* in *Miller II* is doubly suspicious, because it contradicted the publicized policy of the court's Chief Judge. First, in an article in the ABA Journal in 1984, Judge Richard S. Arnold, then a Circuit Judge but Chief Judge of the Eighth Circuit when the Court heard *Miller II*, had emphasized

> the importance of oral argument. It is a crucial stage in the decision-making process. . . .
>
> Oral argument is important to me because it is the only time that all of the members of the court and all of the lawyers are together to discuss the case. When I come into the courtroom for argument, I usually have at least an inclination as to how the case should go. This is based on a reading of the briefs and, in those few cases when time permits, additional

> research or reflection. But this is only an inclination: it still must be tested against statements that counsel will make in open court.
>
> In close cases and cases in which the facts and law are not completely clear, I try to give counsel some hint of my tentative decision. I typically address a question to counsel for the side that seems likely to lose. . . .
>
> That question is not simply a debating point. It is a genuine request for help. And occasionally . . . a lawyer will come up with an answer that really shakes my tentative convictions.
>
> . . . The oral argument is a lawyer's last fair chance to have some influence on the outcome.
>
> . . .
>
> If you have an appeal, don't think your work has ended when the briefs are filed. Your work has just begun. The crucial, perhaps decisive, phase of the case still lies ahead – at the oral argument.[3]

Tony Alamo did not receive, on these complicated, constitutional issues a "last fair chance" to influence the panel on the outcome of this case. His petition for a writ of certiorari presents comprehensive evidence that both the law and the facts in *Miller II* were overwhelmingly in

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[3] M.H. Bright & R.S. Arnold, "Oral Argument? It May Be Crucial!", 70 *ABA Journal* 68 (Sept., 1984), at 69, 70. In a sidebar, the editors of the *Journal* noted that Judge Arnold considered oral argument "necessary" in 75%, and "helpful" in 80%, of the cases he had heard, and that oral argument "had a crucial effect on Judge Arnold * * * in a substantial number of the cases he heard". *Id.* at 70.

his favor. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), eviscerated the conclusion of *Miller I* that the appearance by the allegedly *alter-ego* corporations in the District Court constituted an appearance by Tony Alamo. *Hovey v. Elliott*, 167 U.S. 409 (1897), demolished the notion that *Miller I's* creation of an unprecedented "non-default default judgment" against him was in compliance with the notions of due process. And the record of the Millers' feeble attempts to locate and serve Tony Alamo, prior to seeking service by publication, exposed their lack of constitutionally sufficient "diligence". Yet, even if the Court of Appeals could have misconstrued the law and the facts are not conclusively against the Millers, the issues were at least "close" or "not completely clear."

Nonetheless, confronted with these important and complex issues, the Court of Appeals chose to forego any "genuine request for help" from Alamo's lawyers at oral argument, and instead peremptorily denied them their "last fair chance to have some influence on the outcome" of the case. The panel simply omitted "the crucial, perhaps decisive, phase of the case", although this course of action flew in the face of the admonition of the then Chief Judge of the Circuit.

Second, in an article in *Litigation* in 1983, Judge Richard S. Arnold had also warned that

> [t]he habit of unpublished opinions . . . ought to be examined. . . .
>
> . . . [T]he vice . . . is that most of our courts have local rules prohibiting the citation of unpublished opinions and providing that they shall not have precedential effect. *E.g.*, 8th Cir. R. 8(i). The reason for such rules is that if an

> opinion is unpublished, that lawyers cannot get access to it, and it's not fair for them to be governed by it. I understand that, but the result may be that a judge who writes (and the panel that files) an unpublished opinion holding one way on a certain point of law can – so far as the rules of court are concerned – feel perfectly free to decide the other way the next day, and that is not the kind of behavior that we as judges would consciously engage in, and not the kind of behavior that we conceive of as being consistent with the judicial function.
>
> So when it is possible, and unless the point involved is absolutely frivolous, . . . it is well for opinions to be published, so that they can be subject to scrutiny and criticism, and it is well for one of the judges on the panel to be willing to put his or her name on that opinion. I can tell you from personal experience that you don't feel so vulnerable when you have written a *per curiam*. You think to yourself, "Well, I am one of the three on this, but they can't blame it on me personally because it isn't really I who am writing this, it is the court." . . .
>
> If we can limit this habit to the instances where it's utterly necessary, then we can to that extent reduce the impression that we govern not by reason but by fiat.[4]

Again, Tony Alamo's petition presents comprehensive evidence that the "points [of law] involved" were anything but "absolutely frivolous", that the unpublished opinion in *Miller II* was anything but "utterly necessary",

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[4] R.S. Arnold, "From the Bench: Judges and the Public", 9 *Litigation* 5 (No. 4, Summer, 1983), at 6.

and therefore, that *Miller II* can give no "impression" other than that the Court of Appeals "govern[s] not by reason but by fiat".[5]

Indeed, the clash between *Miller I* and *Zenith Radio Corp.*, and the extravagant absurdity under *Hovey* of the "non-default default judgment" *Miller I* created, compel the conclusions that the panel in *Miller II* hid behind an unpublished, unexplained *per curiam* opinion so that the Judges could "feel perfectly free to decide the other way the next day" on the *alter-ego* issue, and would not "be subject to scrutiny and criticism" on that issue and, indeed, to outright embarrassment on the "non-default default judgment". The movants submit that none of the Judges was "willing to put his . . . name on the opinion", because none of them could imagine a plausible defense for *Miller I*.

But, perhaps, also at work in *Miller II* was something even more questionable than the panel's inability to rationalize *Miller I*. Morris S. Arnold was the District Court judge in the original action who entered a default judgment against Tony Alamo for having failed to appear, and then found the corporations to be Tony Alamo's *alter-egos*,

---

[5] If the issues Tony Alamo raised were so "absolutely frivolous" as to justify an unpublished opinion, surely *Miller II* could easily have explained *why*. Yet, *Miller II* said only that "[t]he district court's rulings are clearly correct". And the District Court, in essence, said only that *Miller I* had already decided the issues against Tony Alamo. See, Petitioner Appendix at 2a, 6a. Overall, then, *Miller II* simply relied on *Miller I*. But, although *Miller I* had generated the absurd "non-default default judgment", it contained not one word alluding to the constitutional problems in what the Court had done.

without noticing the self-contradiction in entering a *default* judgment against a defendant who was supposedly present in court through the *alter-ego* entities. The complexity of the contradictions become more obvious when one considers that the default hearing on damages was held with the supposed *alter-ego* corporations being excluded, though having timely entered an appearance in the case. The District Court Judge's brother, Richard S. Arnold, was then a Judge of the Court of Appeals for the Eighth Circuit. *Miller I* also failed to acknowledge the absurdity of the "non-default default judgment" it allowed. Perhaps this was the result of simple oversight, or perhaps because to do so (and to reverse on the ground of that flagrant error) would greatly have embarrassed both Morris S. Arnold and Richard S. Arnold.

Richard S. Arnold became Chief Judge of the Court of Appeals for the Eighth Circuit on January 7, 1992. Morris S. Arnold became a judge of that Court on May 26, 1992. On February 20 and May 27, 1992, Tony Alamo filed his notices of the appeals later consolidated in *Miller II*. The parties briefed the appeals from May through August 1992, and the court decided *Miller II* on November 19, 1992. Thus, during the critical period of consideration of the appeal, the brothers Arnold were both members of the Court of Appeals.

The decision of the Court of Appeals in *Miller I* (to impose an unprecedented "non-default default judgment") was certainly a decision the Court of Appeal would wish to avoid revisiting. It is, after all, not every day that a court creates something as unparalleled as a "non-default default judgment." Thus, the panel in *Miller*

II had a powerful incentive to avoid any further attention being given to the "legal reasoning" in *Miller I*. Such avoidance was accomplished in the Court of Appeals' unpublished, one-line *per curiam* opinion. Moreover, the incentive was intensified by the central involvement of the brothers Arnold, as any decision in *Miller II* that openly acknowledged the errors of *Miller I* (and of the preceding District Court decision by Morris S. Arnold) would have created a conflict between the Arnolds and would have reversed and perhaps embarrassed the panel in *Miller I*. Common sense forces one to see how this situation would at least subconsciously pressure the panel in *Miller II* not only to refrain from writing an opinion which addresses the substantive issues, but also to keep the issue from resurfacing by denying any oral argument at which Tony Alamo's lawyers could have aired the issues in public, and by refusing to publish even the one-line *per curiam* opinion the panel finally did write.

Thus, even under normal circumstances, the panel in *Miller II* would have found itself in a compromising situation that tested to the limit its ability to resist the temptations of institutional and personal favoritism.[6]

---

[6] In late 1992, however, the circumstances were far from normal. On December 9, 1992, a newspaper columnist reported on possible nominees by then President-elect Clinton for appointment to the Supreme Court of the United States:

> The only name Clinton has ever mentioned as a possible Supreme Court nominee is New York Gov. Mario Cuomo. Beyond that, there is only speculation. The most frequent object of speculation has been Richard Arnold, * * * who since 1980 has served on the Eighth

Admittedly, that is no proof that the members of the panel in *Miller II* were subconsciously overwhelmed by the institutional, personal, and/or political pressures described above. There is no doubt, however, that those pressures were all too present, and that, notwithstanding the serious constitutional issues raised by Tony Alamo, the panel did deny oral argument, did write only a one-line *per curiam* opinion, and then did transmit its unknown reasoning to an unpublished opinion. These undeniable facts must leave any concerned observer with the troubling impression, that (in the words of Judge Richard S. Arnold) in Tony Alamo's case, the Court of Appeal was "govern[ed] not by reason, but by fiat."

How, then is Tony Alamo ever to receive a fair hearing, and an open, thoughtful consideration of the serious

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U.S. Circuit Court of Appeals. Carelli, "Clinton, Gore Hobnob with Supreme Court Justices" Los Angeles Metropolitan New-Enterprise, Wednesday, December 9, 1992 at 7.

If (as it seems fair to presume), this "speculation" about the nomination of Richard S. Arnold to the Supreme Court began shortly after Mr. Clinton's election on November –, 1992, it would have been widespread when the Court of Appeals decided *Miller II* on November 19, 1992. It should be noted that the Court of Appeals had originally scheduled an oral argument for November 12, 1992. But it cancelled the argument, and instead took the case under submission on that date. This would have added a further powerful subconscious incentive for the panel in *Miller II* to avert its eyes from the mess the District Court and the panel in *Miller I* had made of Tony Alamo's case, so as to minimize any untoward publicity that might tarnish the reputations of the brothers Arnold in even the slightest degree and thereby possibly jeopardize Richard S. Arnold's chances for nomination.

constitutional issues his petition raises; and how is the federal judicial system as a whole to convince the public that it does "govern by reason" after all; unless *this* Court steps in now to rectify the Court of Appeals' serious errors on these important constitutional issues.

This travesty of justice has resulted in real suffering by hundreds of associates, their spouses, and their children. They have been displaced from an environment to which many had been accustomed for over fifteen years. Their homes and their personal belongings have been taken from them, not to mention their way of life. Heretofore, the lower Courts have appeared to have ignored the issues raised by Tony Alamo in *Miller II*. It is the hope and prayer of the movants herein, and the other associates and their families, that this Court grant Tony Alamo's Petition for Writ of Certiorari and that the significant constitutional issues raised therein be fully and completely scrutinized by this Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: March 8, 1993.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-1306

In The

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TONY ALAMO,

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ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER, by CAREY MILLER; RICK MILLER; AND JAMES MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Tony Alamo ("Alamo") replies to the brief in opposition of respondents Robert A. Miller *et alia* ("the Millers").

ARGUMENT

I. The Millers' silence concedes that the "non-default default judgment" imposed on Alamo in *Miller I* and upheld in *Miller II* is unprecedented and undefendable.

The Millers say ***NOTHING*** about the creation in *Miller I*[1] and implicit approbation in *Miller II*[2] of the **"non-default default judgment"** against Alamo, although this is a (if not the) major issue of due process he raises.[3] Their silence admits that the **non-default default judgment** is both unprecedented and undefendable, and therefore that a writ of certiorari should issue.[4]

It is bad enough that *Miller I* held *Alamo* to be the *alter ego* of the corporations, even though *he* never had *his* "day in

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[1] Miller v. Tony and Susan Alamo Foundation, 924 F.2d 142 (8th Cir. 1991).

[2] Miller v. Alamo, Nos. 92-1447WA & 92-2205WA (8th Cir. 1992), *in* Petition for a Writ of Certiorari ("Pet. Cert.") at 1a.

[3] *See* Pet. Cert. at 19-23. The Millers cryptically allude to this matter when they suggest that "there is nothing inconsistent about holding that Mr. Alamo entered an appearance [in the District Court through the supposed *alter-ego* corporations] but did not file an answer or otherwise defend, and was therefore placed in default". Brief in Opposition to Petition for Writ of Certiorari ("Br. Opp.") at 8. If, however, the corporations' appearances constituted an appearance by Alamo perforce of their *alter-ego* status, their further actions – such as denying all liability in their answers to the Millers' complaint – must also be attributed to Alamo, thereby rendering entry of a *default* against him impossible. *See* Pet. Cert. at 9-10.

[4] Rule 10.1(c) of the Rules of this Court.

court" on that issue[5], and worse yet that *Miller I* then parlayed this misuse of the *alter-ego* doctrine into what should be a legally unthinkable **non-default default judgment** – but truly intolerable for this Court to blink such a travesty when the parties profiting from it speak not a syllable in its defense.

II. The Millers' silence concedes that their attempts to locate Alamo did not satisfy the constitutional standard for "diligent inquiry" absent which use of Arkansas Rule of Civil Procedure 4(f) denies due process of law.

The Millers do not attempt to prove that their efforts to locate Alamo constituted the *constitutional* minimum of "diligent inquiry" necessary for service by publication under Arkansas law.[6]

Instead, they now argue – as they explicitly chose *not* to do below[7] – that Alamo was not personally served because he was a "fugitive".[8] But the District Court in the original action made *no* finding that service under Arkansas Rule of Civil Procedure 4(f) was appropriate because of Alamo's alleged

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[5] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-11 (1969), *discussed in* Pet. Cert. at 15-18 *and in* Part III, *post.*

[6] *See* Pet. Cert. at 25-28. To the contrary, they dissemble. *E.g.*, they say they "had no reason to attempt service upon Mr. Alamo between November 16, 1988 and March 27, 1988" [*sic*, 1989 is the correct date]. Br. Opp. at 3. In fact, in *February* of 1989, the Millers sought a continuance precisely in order to serve Alamo. Pet. Cert. at 3-4. Again, they say they "attempted mail service at a second address in Saugus, California, which was listed on some tracts published by Alamo". Br. Opp. at 3. In fact, the Saugus address was well and long known to the Millers as the location of Alamo's church and residence in California, and the locus of the allegedly tortious conduct that underlay their suit against him. Pet. Cert. at 5-6. And again, they say they contacted some law firm in California that did not know Alamo's whereabouts. Br. Opp. at 4. Yet, in fact, another litigant – apparently represented by more diligent counsel – located and served Alamo in California in April of 1989. Pet. Cert. at 11.

[7] *See* Pet. Cert. at 11 & n.34.

[8] Br. Opp. at 5, 9-11.

"fugitive" status, relying only on other, themselves inadequate representations by the Millers as to their supposed "diligent inquiry".[9] The District Court on Alamo's FRCP 60(b)(4) motion held *no* evidentiary hearing on the question at all.[10] And the Court of Appeals in *Miller I* and *Miller II* did *not* rest its decisions on Alamo's claimed "fugitive" status, either.[11]

So, once again, as with the **non-default default judgment**, the Millers importune an appellate court to rationalize *ex post* a favorable result the evidentiary predicate for which they failed to supply *ex ante*. This simply piles due-process insult on due-process injury, highlighting the necessity for this Court to issue a writ of certiorari.[12]

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[9] *See* Pet. Cert. at 5-8.

[10] *Id.* at 6a.

[11] *Miller I* "noted in passing" that he was then "a fugitive", but decided the issue on the basis of the Millers' "affidavit" – which did *not* claim that personal service had been frustrated by Alamo's alleged status as a "fugitive". *Compare* Pet. Cert. at 18a-19a *with id.* at 5-7.

[12] The Millers claim that Alamo's position on his alleged "fugitive" status "was soundly rebutted by the record before the District Judge at the time of the motion". Br. Opp. at 9-10. However, their self-interested assessment of the weight of each side's evidence in the District Court is beside the point – because the court refused to conduct an evidentiary hearing to arrive at its own conclusion. Even if the Millers could have asserted Alamo's supposed "fugitive" status as a "Johnny-come-lately" rationalization for use of ARCP 4(f) (which Alamo denies), he still was constitutionally entitled to prove he was not knowingly a "fugitive" during the critical time-period. So, the Millers wrongly contend that "the District Court agreed with [their] alternative grounds for rejecting Alamo's arguments". Br. Opp. at 14 n.6. The District Court's "bottom line" was *Miller I*, on the supposed authority of which it *denied* the very evidentiary hearing necessary to establish the constitutional facts for any "alternative grounds". *See* Pet. Cert. at 6a.

III. The Millers fail to explain away the fatal inconsistency between *Miller I* and *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

The Millers fail to show how *Miller I* can rationally coexist with *Zenith Radio*. Instead, desperately they pretend that,

> [f]irst, the question whether service of process upon one party is sufficient service of process upon a second litigant was never raised or decided in *Zenith Radio*. Second, the purported "alter ego" status of the non-appearing entity had never been litigated or decided, either by the trial court or by other courts in previous cases, as was the situation in the instant case. *Zenith Radio* is therefore distinguishable on its facts * * * .[13]

Hardly. *First*, *Zenith Radio* definitely decided the service-of-process issue. HRI was a named party, served with Zenith's counterclaim; but, said this Court,

> Hazeltine was not named as a party, was never served, and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation.[14]

Thus, *Zenith Radio* held a stipulation that a party is the *alter ego* of a non-party insufficient to confer jurisdiction over the non-party which "was never served, and did not formally appear". That is, "service of process upon one *party*" is ***not*** *ipso facto* "sufficient service of process upon a second" *non*-party simply because the two are *alter egos*.

Second, that Hazeltine's *alter-ego* status was stipulated, not litigated, is immaterial.[15] Indeed, even *litigation* of the *alter-ego* issue would not be conclusive. As *Zenith Radio* explained,

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[13] Br. Opp. at 23.

[14] 395 U.S. at 110.

[15] Stipulation to *in personam* jurisdiction is permissible. *E.g.*, Petrowski v. Hawkeye-Security Ins. Co., 350 U.S. 495 (1956).

> [p]erhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; ***but absent jurisdiction over Hazeltine, that determination would bind only HRI***. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.[16]

The decision could be no clearer: Had Zenith "prove[n]" Hazeltine's *alter-ego* status, "***that determination would bind only HRI***", already a party to the litigation, "***absent jurisdiction over [non-party]* Hazeltine**" – *i.e.*, absent service of process on Hazeltine.[17] Indeed, had the *alter-ego* issue been litigated ***and had Hazeltine actually appeared "to contest jurisdiction"***, entry of judgment against it would still only ***"perhaps"*** have been warranted.

Third, besides being rejected by *Zenith Radio*, the "critical distinction[]" the Millers claim between a stipulation and "evidence presented at a two-day trial on the question"[18] is a figment of their imaginations.[19]

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[16] 395 U.S. at 111 (***bold-face emphasis*** supplied).

[17] Thus it is not accidental that the Millers suppress the first sentence when they quote this passage from *Zenith Radio*. *See* Br. Opp. at 25.

[18] Br. Opp. at 24.

[19] "A stipulation of fact has the force of a finding"; and courts must treat stipulated facts as "established by the clearest proof". Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 589 F.2d 974, 977 (9th Cir. 1978); Schlemmer v. Provident Life & Acc. Ins. Co., 349 F.2d 682, 684 (9th Cir. 1965); Gambill v. United States, 276 F.2d 180, 181 (6th Cir. 1960). Because stipulations "have the effect of eliminating from the trial * * * issues that otherwise might be presented", a trial court need not hold an evidentiary hearing on such issues. Andrews v. St. Louis Joint Stock Land Bank, 127 F.2d 799, 804 (8th Cir. 1942); Emmanuel v. Omaha Carpenters D.C., 560 F.2d 382, 384 (8th Cir. 1977). And a "trial court may not disregard [stipulated] facts * * * or require evidence to support them",

And fourth, the trial between the Millers and *the corporations* alone could not obviate due-process problems in attributing any *alter-ego* finding to *Alamo*. The Circuit Court in *Zenith Radio* denied that

> [Hazeltine] was "adequately represented" * * * on the alter ego question. * * * At no time during the trial did [Hazeltine] have an opportunity to show it was not the alter ego. * * * Zenith's contention that HRI adequately represented [Hazeltine's] interests on the alter ego issue begs the question. On this issue, only [Hazeltine] itself could have protected its own interests.[20]

Moreover, the irrelevance of the lower-court cases the Millers cite shows why *Zenith Radio* is controlling here.[21]

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may not rely on evidence "in direct conflict" with a stipulation, and ha[s] no power to make findings contrary to the terms of a stipulation". United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965); Leizerowski v. Eastern Freightways, Inc., 514 F.2d 487, 490 (3rd Cir. 1975); Burstein v. United States, 232 F.2d 19, 22 (8th Cir. 1956).

[20] Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25, 30 (7th Cir. 1967), *quoting* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). Thus, *Zenith Radio* anticipatorily rejected the Millers' claim that Alamo "had a full and fair opportunity to litigate the question whether the corporate litigants were actually mere extensions of himself". Br. Opp. at 25.

[21] Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc., 519 F.2d 634, 636-38 (8th Cir. 1975) (*alter-ego* status of corporation establishes "minimum contacts" with forum; but individual defendant did *not* contest "procedural requirements with regard to service of process"); Certified Bldg. Prods. v. NLRB, 528 F.2d 968, 969 (9th Cir. 1978) (no facts given as to situation *sub judice*); IAM Nat'l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1257-59 & nn.5-6 (D.C. Cir. 1983) (*alter-ego* status of one corporation establishes "minimum contacts" of another; but president of second corporation *actually served* with process in forum); Minnesota Mining & Mfg. Co. v. Eco Chem., Inc., 757 F.2d 1256, 1259, 1261, 1264-65 (Fed. Cir. 1985) (after 3M sued ECI (a Minnesota corporation) and moved to add ECL (a Georgia corporation) and two Georgia residents (the Rynnes) as parties pursuant to FRCP 25, *"[a]ll of these parties were properly served with notice of the motion" and appeared at a hearing*, whereupon the court added them "as successors in interest

IV. The state-court judgments entered after *Miller I* did not preclude Alamo's Federal Rule of Civil Procedure 60(b)(4) motion.

Lacking any support in federal law, the Millers invoke as *res judicata* state-court default judgments against Alamo in Arizona and Arkansas, entered after *Miller I*, that supposedly held the corporations to be his *alter egos*.[22] This defense is doubly bootless.

First, when the Millers raised the state-court judgments as a defense to Alamo's FRCP 60(b)(4) motion, he had a right to respond that the judgments were void, because those courts lacked *in personam* jurisdiction over him.[23] But the District Court denied any evidentiary hearing, and ruled for the Millers on the basis, *not* of the state-court judgments, but of the decision in *Miller I* which preceded them. Thus, to interpose the state-court judgments now as a bar *ex post* would be to

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and alter egos" of ECI; court held the Rynnes had "minimum contacts" with Minnesota to satisfy due process); Bally Export Corp. v. Balicar Ltd., 804 F.2d 398, 404-05 (7th Cir. 1986) (corporation contesting service *waived* the issue, and in any event *service was adequate*; in *dicta*, court said that, because corporations were *alter egos*, "service on one * * * is effective as to both" – but cited only *Wakefield Industries*, *ante*, in which corporation contesting jurisdiction had actually been served); *and* NLRB v. Denna Artware, Inc., 310 F.2d 470, 473-74 (6th Cir. 1962) (court has jurisdiction in contempt proceeding to order discovery against affiliated corporations of a corporate party under the "single-enterprise" concept, *but recognizes "a distinction between jurisdiction for * * * entering a judgment in personam and jurisdiction for adjudication in civil contempt"*).

[22] Br. Opp. at 18-22.

[23] A void judgment is "a nullity"; "[a] party cannot be precluded from raising the issue of voidness in a * * * collateral attack because of the failure to object prior to, or at the time of, entry of the judgment"; and a void judgment is "subject to collateral attack in any court where the validity of the judgment c[o]me[s] in issue". Walden v. Craig's Heirs, 39 U.S. (14 Pet.) 147, 154 (1841); Jordan v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974); 7 *Moore's Federal Practice* (1990), ¶ 60.25[1], at 60-219 (footnote citing Supreme-Court authority omitted).

deprive Alamo of yet another element of due process he was owed, but which was withheld from him, *ex ante*.

Second, if he ever obtains a day in court, Alamo would attack the state-court judgments as void. As to the Arizona case, Alamo has *never* "admitted through his attorney that he had been served by publication" (as the Millers falsely claim).[24]

The Arkansas judgment has a further fatal jurisdictional flaw. On the Millers' motion, on 6 March 1991 the court struck the corporations' answers on the grounds that: (i) the District Court in *Miller I* had stripped them of their "legal capacity to act as * * * independent person[s]"; (ii) they were not the "real parties in interest"; and (iii) they could not defend that case as "surrogate entities" for Alamo while he "remain[ed] a fugitive from justice".[25] Yet, on 23 January 1991 *Miller I* had held that Alamo *had* "appeared" vicariously in the District Court because the corporations, which appeared in actuality, were his *alter egos*; and *Miller I* allowed the corporations to prosecute that appeal, notwithstanding the contention that Alamo was then a "fugitive".[26] Thus, *Miller I* used the *alter-ego* theory to bring Alamo personally *into* court through the corporations – whereas, the Arkansas court employed the same *alter-ego* theory to keep him *out* despite that presence, and notwithstanding that the issue was *res judicata* as between the corporations and the Millers perforce of *Miller I*! *Miller I* violated due process at the jurisdictional level under *Hovey* v. *Elliott*[27] because *Miller I's* unexpected seizure upon the theory of vicarious representation denied Alamo a meaningful notice and opportunity to

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[24] Br. Opp. at 12. The attorney said only that Alamo was "*allegedly* served by publication" (emphasis supplied).

[25] Appellees' Appendix in *Miller* v. *Alamo*, No. 92-1447WAFS (8th Cir), at 649-50.

[26] *See* 924 F.2d at 147.

[27] 167 U.S. 409 (1897), *discussed in* Pet. Cert. at 19-23.

defend his interests at trial and on appeal.[28] The Arkansas court violated due process at the jurisdictional level under *Hovey*, too, by striking the corporations' appearances – because, as against the Millers perforce of *Miller I*, their appearances *were* Alamo's "appearance".[29]

V. *Res judicata* does not bar Alamo's access to his personal property the Millers improperly hold.

Typically, the Millers' assertion of *res judicata* as to the issue of possession of Alamo's personal property begs the

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[28] This is a fundamental requirement of due process. *E.g.*, Armstrong v. Manzo, 380 U.S. 545, 550-52 (1965).

[29] The Arkansas court's theory that, "for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts", also manifestly violates due process. *Pace* Appellees' Appendix, *ante* note 25, at 650, *citing* Molinaro v. New Jersey, 396 U.S. 365 (1970). *First*, cases in the *Molinaro* line denied review of fugitives' criminal convictions because, whether the courts affirmed or ordered a new trial, the fugitives were unlikely to appear. *See* Smith v. United States, 94 U.S. 97, 97 (1876); Allen v. Georgia, 166 U.S. 138, 141 (1897); United States v. Shelton, 482 F.2d 848, 849 (5th Cir. 1973); United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973); Arana v. INS, 673 F.2d 75, 76-77 (3rd Cir. 1982) (deportation). Here, distinguishably, both state courts had jurisdiction over real property to satisfy any judgment for the Millers, whether or not Alamo ever appeared in person. *See* Appellees' Appendix at 646, 658-59. *Second*, in civil cases denying access to the courts, the fugitives are typically *plaintiffs*, not defendants. *E.g.*, Ali v. Sims, 788 F.2d 954, 959 (3rd Cir. 1986). Whatever the merits of denying a fugitive *plaintiff* a judicial forum, even in a criminal case "[a] defendant who is granted bail * * * pending trial and then fails to appear does not suffer the penalty of being convicted by default". United States v. Tremont, 438 F.2d 1202, 1203 (1st Cir. 1971). Indeed, even an enemy alien, if sued, has "the right to use all the means and appliances of defense". "If assailed * * * he could defend * * * . The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. * * * It would be contrary to the first principles of the social compact and of the right administration of justice". McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1871) (footnote omitted).

question.[30] For, as Alamo asserts and *Zenith Radio* proves, because *Miller I* did ***not*** properly hold him to be the corporation's *alter ego*, denial of the corporation's motion as to the property had *no* bearing on his rights to bring his own motion on that subject.

CONCLUSION

The Millers' brief illustrates why the writ must issue.

Respectfully submitted,

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[30] Br. Opp. at 26-28.